Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

LUZVISAMINDA ABLANG,

Petitioner,

v.

JANET RENO, Attorney General
of the United States, and
WARREN CHRISTOPHER, Secretary
of State of the United States,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the legitimation or adjudication of paternity time limit of § 205 of the Nationality Act of 1940 create unequal treatment on the bases of illegitimacy and gender warranting intermediate scrutiny of the statute?

2. Is there a rational basis for the legitimation or adjudication of paternity time limit of § 205 of the Nationality Act of 1940?

3. Does § 205 of the Nationality Act of 1940 create irrebuttable presumptions based on gender and illegitimacy without affording the affected party the ability to present undisputed evidence of paternity thus violating the fifth amendment's guarantees of due process and equal protection?

4. Does § 201(i) of the Nationality Act of 1940 confer citizenship on the Philippine-born daughter of a qualified United States citizen serviceman where the Philippines was treated as a foreign country by the virtue of the Philippine Independence Act?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner: Luzvisaminda Ablang

Respondents: Janet Reno*, Attorney General of the United States, and Warren Christopher, Secretary of State of the United States.

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* Janet Reno was substituted for her predecessor, William P. Barr, Attorney General of the United States, pursuant to Fed.R.App.P. 43(c)(1).

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LUZVISAMINDA ABLANG,

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PETITION FOR WRIT OF CERTIORARI

Luzvisaminda Ablang hereby petitions for a writ of certiorari and requests that this Court grant the petition, issue a writ of certiorari, reverse the judgment of the Ninth Circuit of the court of appeals and remand with instructions to affirm the judgment of the district court.

OPINIONS BELOW

The opinion of the court of appeals for the Ninth Circuit in *Ablang v. Reno,* is reported at 52 F.3d 801 (1995).

Appendix A at 1 [hereinafter App.]. The unpublished order of the court of appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc, issued June 27, 1995, is reproduced at Appendix K, App., at 79. The order of the district court denying defendants' motion to alter or amend the judgment, issued May 27, 1993, is reproduced at Appendix F, App., at 59. The unpublished decision of the district court, as incorporated in the transcript of proceedings of April 19, 1993, is reproduced at Appendix D, App., at 30-55.

The decisions of the regional director of the Passport Agency, entered September 11, 1991 and October 26, 1992, are found in Appendix G, App., at 60 and Appendix H, App., at 64, respectively. The decision of the district director of the Immigration and Naturalization Service, entered October 29, 1992, is found in Appendix I, App., at 68. The decision of the INS associate commissioner, issued December 31, 1992, is reproduced in Appendix J, App., at 72.

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The court of appeals for the Ninth Circuit entered its judgment on April 14, 1995. App., at 1. The Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc on June 27, 1995. App., at 79. Jurisdiction in the district court for the Central

District of California was based on 8 U.S.C. § 1503(a) and 38 U.S.C. § 2201.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This petition concerns the due process clause of the fifth amendment with its guarantee of equal protection under the law.

The petition involves § 205 of the Nationality Act of 1940, 54 Stat. 1137, the text of which is set forth in Appendix C, App., at 29 (repealed by § 403(a)(42) of the Immigration and Nationality Act, 66 Stat. 163 (1952)). The petition also concerns § 201(e) of the Nationality Act of 1940, App., at 25, as well as § 201(i) added by the Act of July 31, 1946, 60 Stat. 721, App., at 26. The petition also involves the Philippine Independence Act, 48 Stat. 462 (1934), App., at 15.

STATEMENT OF THE CASE

A. Factual Background

The undisputed facts are that the petitioner was a war baby, born in the Philippines on June 8, 1946 to a United States citizen father, Walter Gray Simmerson, Jr., and a Philippine-born mother, Patricina Reso. Cir. Opinion, App., at 4. Petitioner's father was a United States serviceman who served honorably in the armed forces between March 30, 1943 and January 20, 1946. He returned to the United States from his wartime duty six

months before she was born. The petitioner's mother, poor and unmarried, gave the baby up to be raised by a family that was better able to provide for her welfare.

The petitioner overcame great odds to find her natural father. She was raised from infancy by a couple whom she believed were her natural parents. Although there had been rumors that she was "adopted" she had dismissed them as untrue until she was approached at her place of work by her natural mother. Even then, the circumstances of her birth were confusing and uncertain to her. She was discouraged from attempting to find out about her natural father and misinformed that he was dead.

At thirty-five years of age, she decided to find the missing pieces of her life. She wrote to an old address reluctantly provided by her natural mother and was ultimately successful in locating her natural father.

Walter Gray Simmerson, Jr., confirmed that he was born on December 21, 1924 in Salisbury, North Carolina and had resided in the United States since birth, excepting only the period of military service that he performed outside the United States.

When petitioner applied for a certificate of citizenship from the Immigration and Naturalization Service, she submitted affidavits from her natural father acknowledging his paternity, as well as the judicially accepted results of the genetic testing each of them had undergone. Cir. Opinion, App., at 2.

B. Proceedings Before The District Court

On April 23, 1993, Judge Irving Hill of the district court of the Central District of California granted the petitioner's motion for summary judgment (Appendix E, App., at 56) conferring citizenship on the petitioner under § 201(e) of the Nationality Act of 1940, App., at 25.

The blood relationship between the daughter and her United States citizen father was established by genetic testing and is undisputed by the Government. Cir. Opinion, App., at 2. Judge Hill held that:

> The statements and acts of this father, Mr. Simmerson, as I have related them, amount to as strong a case of proof of being the child of an American father, and as strong a case of the father's recognizing and accepting the child as his daughter as one could imagine.

District Court Transcript at 28.

The district court found that § 205, the legitimation or adjudication of paternity time limit provision of the 1940 Nationality Act, was unconstitutional under the intermediate scrutiny test, as well as under the rational basis test. App., at 35. The Government's rationale of "close family ties" and "problems of proof" were rejected. App., at 42-43.

The district court analyzed the nationality law in this case and found that the petitioner was already conferred with citizenship at birth by the language of § 201(e):

> What we have in this statutory pattern . . . is a blanket grant of citizenship in section 201 for a group, which includes the plaintiff. Then we have a later attempt to take it away – or limit

> that blanket grant, and take it away from plaintiff because plaintiff is illegitimate.

App., at 31-32.

Judge Hill found that § 205 is unconstitutional as a violation of the equal protection clause with the following reasoning:

> The take-away section, 205, applies only when the American citizen parent is a man, the father. It doesn't apply to situations where the American citizen parent is the mother. Moreover, it requires that the acts of legitimation or court adjudication be undertaken and completed during the minority of the child.
>
> I propose to find that section 205 is unconstitutional as both a sexist discrimination and because the legitimation requirement imposed on the child is not rationally related to any governmental purpose, and, thus, is facially void.

App., at 31-32.

The district court found two forms of constitutionally impermissible discrimination in § 205 – discrimination against illegitimate children as a class, as well as gender-based discrimination.

C. Proceedings Before The Court Of Appeals

The defendants, the Attorney General and the Secretary of State, appealed from the judgment of the district court, and the court of appeals accepted jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit reviewed the grant of summary judgment by the district court de novo. Cir. Opinion, App., at 5. The court of appeals' constitutional analysis was as follows:

> We agree with the Government that citizenship does not inhere under the Act unless and until paternity is established, provided this takes place by the age of majority. The question before us is whether the Act unlawfully discriminates between: 1) classes of children born abroad to an alien and a United States citizen parent, on the basis of legitimacy; or 2) classes of illegitimate children born abroad to an alien and to a United States citizen parent, on the basis of the United States citizen parent's gender.

Cir. Opinion, App., at 8.

The Ninth Circuit applied the "facially legitimate and bona fide reason" test which was found to be equivalent to the rational basis test typically applied in equal protection cases. Cir. Opinion, App., at 9 (citing *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1414 n.3 (9th Cir. 1993)). The court of appeals then proceeded to decide that there was a rational basis for § 205 (App., at 29) with the following language:

> While we are aware of the increasing use and reliability of blood and genetic testing to establish paternity, we hold that the Government has put forth facially bona fide and legitimate reasons for the time limitations of section 205 of the Act. We acknowledge that the burden placed on the illegitimate child of a United States citizen father in requiring her to establish paternity while still a child is a heavy one. But we cannot say that Congress's desire to promote early ties to this country and to those relatives who are citizens of this country is not a rational basis for the requirements made by section 205 of the Act.

> Thus, we hold that the statutory sections in question are not unconstitutional.

Cir. Opinion, App., at 13.

For those reasons, the court of appeals reversed the district court's grant of summary judgment and remanded the case with instructions to dismiss the complaint with prejudice.

REASONS FOR GRANTING THE PETITION

I.

THE LEGITIMATION OR ADJUDICATION OF PATERNITY TIME LIMIT OF § 205 OF THE NATIONALITY ACT OF 1940 CREATES UNEQUAL TREATMENT ON THE BASES OF ILLEGITIMACY AND GENDER. THE NATURE OF THIS DISCRIMINATION WARRANTS INTERMEDIATE SCRUTINY OF THE STATUTE.

Judge Irving Hill held that the legitimation or adjudication of paternity time limit of § 205 unlawfully discriminated against the petitioner since she is the daughter of a male United States citizen with undisputed proof of paternity. Judge Hill found that:

> The intermediate standard is used when the court deals with discrimination or disparate treatment of a gender, or as between natural and illegitimate children. These classes are entitled to considerable protection against discriminatory treatment.
>
> The statute, if it deals with gender discrimination or discrimination against illegitimate children, must be substantially related – let me emphasize again – substantially related to the achievement of a legitimate Government interest.

App., at 34.

The district court analyzed the legitimation or adjudication of paternity time limit of § 205 and found that using either the intermediate scrutiny test or the rational basis test that "whichever one is applied, section 205 cannot survive constitutionally." App., at 35.

This Court held in *Mathews v. Diaz*, 426 U.S. 67, 80 (1976), "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." However, unlike the governmental decision at issue in *Fiallo v. Bell*, 430 U.S. 787 (1977), involving the Congressional determination as to how aliens should or should not be accorded rights under the legal immigration system, this case involves the rights of a U.S. citizen parent to transmit citizenship to offspring recognized by the Ninth Circuit in *Wauchope v. United States Dept. of State, supra;* Cir. Opinion, App., at 10.

Intermediate scrutiny is called for because petitioner was indisputably a United States national at the time of birth through § 101(b) of the Nationality Act of 1940, as a "person" who owed "permanent allegiance to the United States." App., at 22. Petitioner's nationality status at the time of her birth is important since the court of appeals reversed the district court's findings of discrimination based on gender and illegitimacy using the rational basis test in deference to the Congress's plenary power over *aliens*. *Mathews v. Diaz*, 426 U.S. at 80.

The petitioner, at birth a national of the United States, falls within the citizenship classification found in § 201(e). App., at 25. Its plain meaning classifies "[a]

person born in a possession of the United States of parents one of whom is a citizen of the United States." Using this standard, the Ninth Circuit found that the petitioner's father satisfied the "parental requirement" (Cir. Opinion, App., at 5) and that petitioner meets the elements for qualification under § 201(e). *Id.* at 11.

This determination of the father's and daughter's qualifications under the § 201(e) citizenship classification is important when the § 205 time limit fails for a lack of a substantial relation to the achievement of a legitimate governmental interest under intermediate scrutiny.

The court of appeals' assignment of "problems of proof" and "close family ties" are the type of analytical afterthoughts that fail to satisfy the intermediate standard of review as chronicled by Professor Tribe in his treatise:

> However weighty an objective, however closely it might fit the challenged rule, and however persuasively it is currently articulated by the rule's defenders, that objective should not be credited, once the rule is subjected to intermediate scrutiny, if there are convincing reasons to believe that the objective is being supplied purely by hindsight – as one of several "after-the-fact rationalizations" invoked to justify a rule that was not in fact adopted with the objective in mind (citing *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring in result)). When either the nature of the classification challenged or the character of the deprivation attacked warrants intermediate scrutiny, "inquiry into the actual purposes" (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648

> (1975)) of the rule, as illuminated by its language, its structure, and its history, warrants the rule's invalidation when it can be defended only with considerations that did not in fact contribute to its enactment.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-32 (1988) [hereinafter cited as TRIBE] (footnotes omitted).

As the district court correctly noted, the legislative history does not articulate a Congressional purpose for the legitimation or adjudication time limit provision found in § 205. App., at 35. It may very well be that "discrimination against the illegitimate is rooted so deeply in our culture that legislative enactments on illegitimacy are generally silent as to legislative purpose." Krause, *Equal Protection for the Illegitimate*, 65 MICHIGAN L. REV. 477, 489 (1967).

The fact that the Government cited as a rationale in its brief to the Ninth Circuit "that illegitimate children are the children of no one" belies the need for this Court to afford more than minimum scrutiny to § 205 of the Nationality Act of 1940. Appellants' Ninth Circuit Brief at 19, *Ablang v. Reno*, 52 F.3d 801 (1995) (citing *Compagnie Generale Transatlantique v. United States*, 78 F. Supp. 797 (Ct. Cl. 1948)). Those bases proposed by the Attorney General and the Secretary of State, "problems of proof" (Cir. Opinion, App., at 12) and "close family ties" (*Id.*), clearly demonstrate the need for intermediate scrutiny in reviewing a citizenship statute that invidiously discriminates on account of gender and illegitimacy.

Section 205 creates a discriminatory classification which is overinclusive in that it allows presumptive proof of paternity without consideration of scientific proof of paternity. The proper analysis is whether the statute "is

carefully tuned to alternative considerations". *Mathews v. Lucas*, 427 U.S. 495, 513 (1976); *Trimble v. Gordon*, 430 U.S. 762, 772 (1977). The legitimation or adjudication provision of § 205 is not carefully tuned to alternative considerations and should be declared unconstitutional on equal protection grounds.[1]

II.

THERE IS NO RATIONAL BASIS FOR THE LEGITIMATION OR ADJUDICATION OF PATERNITY TIME LIMIT OF SECTION 205 OF THE NATIONALITY ACT OF 1940.

Under the rational basis test, the logic of using the legitimation or adjudication time limit of § 205 as a basis for the denial of petitioner's citizenship claim cannot pass constitutional muster. In *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977), this Court found that "the Constitution prevents (the State) from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns." In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972), Justice Brennan analyzed that "imposing disabilities on the illegitimate child is contrary to the basic concept of our

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[1] California Civil Code § 7004(a) sets forth significant "alternative considerations" to legitimation for presumptive male parenthood. Illegitimacy was abolished in California, effective January 1, 1976. The alternative presumptions of paternity found in California Civil Code § 7004(a) include such situations as those involving children born during or within 300 days after termination of marriage, acknowledged children living outside the U.S., children born of an invalid marriage and blood test results.

system that legal burdens should bear some relationship to individual responsibility or wrongdoing." In *Plyler v. Doe*, 457 U.S. 202, 220 (1982), the Court struck down a Texas law which withheld state funds from local schools which educated undocumented children as violative of equal protection because the children so harmed "can affect neither their parents' conduct nor their own status."

Therefore, citizenship is too precious to be granted or denied based on the action or inaction of someone not subject to control by the child whose rights are at issue. Distinctions, such as immigration or marital status, properly disregarded by Justice Powell in *Plyler v. Doe, supra*, penalize children for something they cannot possibly influence.

A. "Problems of Proof" Fails as a Rational Basis.

The Ninth Circuit found "problems of proof" as a rational basis for the legitimation or adjudication time limit in § 205. Cir. Opinion, App., at 13. (citing *Fiallo v. Bell*, at 799 n.9). The question raised by the court of appeals "problems of proof" rationale is whether the legitimation classification of § 205 is designed "so as not to discriminate between . . . inhabitants except upon some reasonable differentiation fairly related to the object of regulation." *Railway Express v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). The indiscriminate lumping together of all illegitimate children with the ability of only the male parent to effect the presumption represented by § 205 is overinclusive and discriminates against illegitimates with undisputed evidence of paternity, such

as petitioner. Section 205's provisions apply to some persons who do not possess the characteristics the statute seeks to regulate. Tussman and ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 541, 548 (1949). The "problems of proof" rationale adopted by the Ninth Circuit failed to address the issue that legitimation is not proof of paternity, it is a legal presumption based on the laws of the various jurisdictions, both foreign and domestic, which vary widely from place to place.[2]

When the Ninth Circuit acknowledged the "increasing use and reliability of blood and genetic testing to establish paternity" (Cir. Opinion, App., at 13) and the resulting conclusion that "in *her* case there is no unresolved question of paternity" (App., at 11) it has set forth the elements of impermissible overinclusiveness inherent in the application of the § 205 time limit to the petitioner's case.

This Court in *Stanley v. Illinois*, 405 U.S. at 656-657 (1972), expressed its disdain for using presumptions in lieu of individualized determinations of paternity:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

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[2] A discussion of forms of legitimation is found in Justice Marshall's dissent in *Fiallo v. Bell*, 430 U.S. at 814-815 n. 14.

Justice Marshall's dissent in *Fiallo v. Bell,* as to the failure of the proposed rationale of "problems of proof" should be given enhanced meaning in this case where the daughter has introduced undisputed evidence of paternity:

> This Court has been equally intolerant of the rationale when it is used to deny rights to the illegitimate child. While we are sensitive to " 'the lurking problems with respect to proof of paternity,' " *Trimble v. Gordon, ante,* at 771, quoting *Gomez v. Perez,* 409 U.S. 535, 538 (1973), we are careful not to allow them to be "'made into an impenetrable barrier that works to shield otherwise invidious discrimination.' " *Trimble, ante,* at 771. We require, at a minimum, that the " 'statute [be] carefully tuned to alternative considerations,' " *ante,* at 772, quoting *Mathews v. Lucas,* 427 U.S. at 513, and not exclude all illegitimates simply because some situations involve difficulties of proof. *Ibid.*

Fiallo v. Bell, 430 U.S. at 813.

The "problems of proof" rationale which was mentioned in a note in *Fiallo,* 430 U.S. at 799 n.8, has been obviated as a proposed rational basis in recent years by "the increasing use and reliability of blood and genetic testing to establish paternity" Cir. Opinion, App., at 13. In fact, the Immigration & Naturalization Service's own INTERPRETATIONS at § 341.2 specifically authorizes blood tests in cases such as this one involving an administrative issuance of a certificate of citizenship. Justice Marshall, in his dissent in *Fiallo v. Bell,* disposed of the rationale of "problems of proof" as follows:

> The likelihood of such a rationale is diminished considerably by the comprehensive and elaborate administrative procedures already established and employed by the INS in passing on claims of the existence of a parent-child relationship. All petitions are handled on a case-by-case basis with the petitioner bearing the burden of proof. Moreover, the INS is no stranger to cases requiring proof of paternity.

430 U.S. at 813-814.

B. "Early Ties to this Country and to those Relatives who are Citizens of this Country" Fails as a Rational Basis.

The court of appeals' opinion accepts "early ties to this country and to those relatives who are citizens of this country" as a rational basis for the time limit imposed by § 205 of the Nationality Act of 1940. Cir. Opinion, App., at 12. This Court, however, need not accept such rationale for a statute which, on its face, simply does not apply to the subject matter of the statutory provision. Congress did not require, in § 201(e), that children born to a citizen parent in an outlying possession meet a retention requirement. *Cf.* § 201(g) of the Nationality Act of 1940 (requiring the child to reside in the U.S. or its outlying possession for a total of five years between the ages of thirteen and twenty-one). App., at 25. *In accord* INS INTERPRETATIONS, § 309.1(b)(6)(ix).

> However, courts "need not in equal protection cases accept at face value assertions of legislative purposes, when . . . the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 1233 n.16, 43 L.Ed.2d 514 (1975).

> " '[W]e [must be] careful not to attribute to the [government] purposes which it cannot reasonably be understood to have entertained.' " *Christian Science Reading Room v. City and County of San Francisco,* 792 F.2d 124, 124 (9th Cir. 1986) (*quoting Delaware River Basin Commission v. Bucks County Water and Sewer Authority,* 641 F.2d 1087, 1097 (3rd Cir. 1981), *cert. denied,* 479 U.S. 1066, 107 S. Ct. 953, 95 L. Ed. 2d 1002 (1987)).

Wauchope v. U.S. Dept. of State, 985 F.2d 1407, 1415 (9th Cir. 1993).

It is clear that "early ties to this country" is attributing to the Congress a rationale for the legitimation provision of § 205 which it cannot reasonably be understood to have considered. Section 201(e) of the Nationality Act of 1940, by its plain meaning, deals with a person born in an outlying possession of the United States. This should be distinguished from those statutory citizenship provisions which apply to persons born **outside** of the United States and its outlying possessions. *See e.g.* §§ 201(c),(d),(f),(g),(h) and (i) of the Nationality Act of 1940, App., at 24-27.

Because the petitioner was born in an outlying possession and was a national of the United States at birth, the "early ties to the U. S." rationale is attributing a basis for the legitimation or adjudication of paternity time limit provision which Congress could not have reasonably been expected to entertain.[3]

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[3] Section 101(b) of the Nationality Act of 1940 demonstrates that petitioner was a "person" who owed "permanent allegiance to the United States" and was a national of the United States at birth. App., at 22.

The Ninth Circuit's use of "early ties" to "those relatives who are citizens of this country" also fails as a rationale for the overinclusive legitimation or adjudication time limit by the very words of the statute. App., at 13. The adjudication of paternity by a court contemplated by § 205 does not necessarily foster "early ties" or a close personal relationship between a reluctant defendant father and a successful child litigant through his or her guardian. Nor can it be disputed that the Act recognizes legitimate, legitimated, step, adoptive parent-child relationships, and mother-illegitimate child relationships that are not necessarily close. *See* Justice Marshall's dissent in *Fiallo v. Bell,* 430 U.S. at 811.

The Ninth Circuit, at the Government's urging, adopted the "family ties" rationale found in *Fiallo v. Bell,* 430 U.S. at 799; App., at 12. The statute and purpose that the Supreme Court was addressing in *Fiallo* was different. In *Fiallo,* the Court reviewed the preference system, as to which aliens Congress had selected for entry as immigrants, found in § 101(b) of the 1952 Act.[4]

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[4] Section 101(b) of the Immigration and Nationality Act of 1952, 66 Stat. 280, *as amended by* Act of November 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. § 101(b) provided as follows: 1) the term "child" means an unmarried person under twenty-one years of age who is . . . (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside of the United States, if such legitimation takes place before the child reaches the age of eighteen years *and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation* (emphasis added).

There was a requirement in the 1952 Act that the child be in the "legal custody" of the legitimating parent or parents at the time of legitimation before the child's eighteenth birthday. The "family ties" rationale of the Supreme Court in *Fiallo* may thus be ascribed to the requirement of legal custody in the 1952 Act as it was before the Court in 1977. There was no such "family ties" requirement of legal custody in § 205 of the Nationality Act of 1940.

III.

SECTION 205 OF THE NATIONALITY ACT OF 1940 CREATES IRREBUTTABLE PRESUMPTIONS BASED ON GENDER AND ILLEGITIMACY WITHOUT AFFORDING THE AFFECTED PARTY THE ABILITY TO PRESENT UNDISPUTED EVIDENCE OF PATERNITY THUS VIOLATING THE FIFTH AMENDMENT'S GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION.

The Ninth Circuit in its de novo decision concerning the effects of § 205 has raised the additional issue of overbredth:

> *Ablang* argues that there is no rational basis for the paternity requirement because in *her* case there is no unresolved question of paternity: the Government concedes that she is the daughter of Walter Simmerson, a United States citizen who was eligible to transmit his citizenship to Ablang at birth. *Ablang* misses the point; the peculiarities of her case are not decisive. Rather, there must be some discernible rational basis for the legislature's decision to distinguish the class to which she belongs.

Cir. Opinion, App., at 10.

The court of appeals seeks to equate the overbroad § 205 of the Nationality Act of 1940 with the legitimation provision found in *Fiallo v. Bell*, 430 U.S. at 799 n.9. While the *Fiallo* decision dealt with theoretical "problems of proof" in a legitimation provision for immigration classification, petitioner has no such evidentiary problems since she has uncontroverted proof of paternity.

It is undisputed that Congress has the power to provide rules of evidence in quasi-judicial and judicial proceedings under the federal immigration statutes. What the fifth amendment due process clause limits is Congress's ability to prescribe such rules without affording the affected party the opportunity to present undisputed evidence of parentage that should be given as much weight as the presumptive effect of legitimation. Congress could remedy the procedural defects of § 205 so long as the scheme it prescribes holds to the following rule:

> [A] legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law [but] it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

Mobile, J. & K.C. R. R. v. Turnipseed, 219 U.S. 35, 43 (1910).

Inherent in the Ninth Circuit's decision is the presumption that the applicant for the acquisition of citizenship who was born out of wedlock is a member of a special class of persons who were born without proof of parentage except that which may be bestowed by the male parent. This is akin to the irrebuttable presumption struck down by the Court in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the state statute forced sterilization on the class of convicted persons "without opportunity to [each] individual to show that his [was] not the type of case which would justify resort to it". *Id.* at 544 (Stone, C.J., concurring in result).

The effect of the act of legitimation contemplated by § 205 is itself a presumption as to the male parentage of the child, also made irrebuttable by the effect of the statute. Judge Hill recognized that the legitimation or adjudication of paternity time limit of § 205 worked as impermissible gender-based discrimination. The district court, therefore, adopted the reasoning of Judge Sarokin in *LeBrun v. Thornbugh*, 777 F. Supp. 1204, 1206 (D.N.J. 1991) who found:

> Those who have no choice in the marital state of their parents should not be so penalized or stigmatized, and their right to citizenship should not be dependent on the moral fortitude (or lack thereof) of one of their parents. The unfairness is exacerbated by placing such power solely in the hands of the male parent. The law was thus discriminatory in its impact upon children born out of wedlock and sexist in making citizenship dependent upon the acquiescence of the male parent only.

The harsh effect of the discriminatory scheme created by § 205 may be demonstrated by the fact that the statute allowed the male parent to accomplish the legitimation prior to the child's twenty-first birthday, but excludes the results of genetic testing which proves a DNA link to the parent that is scientifically traced to the beginning of the child's life.

When the citizenship and passport applications of the petitioner were denied, the Government was employing the 1940 Act's hierarchy of presumptions involving gender and illegitimacy that should have invoked the fifth amendment's due process and equal protection guarantees. The Ninth Circuit did not recognize that this Court has held "that gender may not be given even a rebuttable, burden-shifting significance in such matters as the distribution of economic benefits or social opportunities". TRIBE, *supra*, at § 16-34 (citing *Craig v. Boren*, 429 U.S. 190, 210 n.24). "Contrast illegitimacy, which may be given *rebuttable* but not *irrebuttable* significance." *Id.* (citing *Mathews v. Lucas*, 427 U.S. 495 (1976)).

IV.

SECTION 201(i) OF THE NATIONALITY ACT OF 1940 WOULD CONFER CITIZENSHIP ON THE PHILIPPINE-BORN DAUGHTER OF A QUALIFIED UNITED STATES CITIZEN SERVICEMAN WHERE THE PHILIPPINES WAS TREATED AS A FOREIGN COUNTRY BY VIRTUE OF THE PHILIPPINE INDEPENDENCE ACT.

To determine whether this petitioner acquired United States citizenship at the time of her birth, it is necessary to analyze the law in effect at that time and then determine whether the conditions prescribed by that law were

met. C. GORDON, S. MAILMAN & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 93.02(1)."The applicable law for transmitting citizenship to a child born abroad when one parent is a U. S. Citizen is the statute that was in effect at the time of the child's birth." *Runnett v. Schultz*, 901 F.2d 782, 783 (9th Cir. 1990).

In the de novo review of the district court's decision, the Ninth Circuit raised the following issues:

> "The question before us is whether the Act unlawfully discriminates between: 1) classes of children born abroad to an **alien** and a United States citizen parent, on the basis of legitimacy; or 2) classes of illegitimate children, born abroad to an **alien** and a United States citizen parent on the basis of a United States citizen parent's gender."

Cir. Opinion, App., at 8 (emphasis added).

In its opinion, the court of appeals described petitioner's parents' nationality status as a "United States citizen father and an **alien** mother". Cir. Opinion, App., at 7 (emphasis added). The Ninth Circuit thus treated the petitioner's national mother as an alien at the time of the daughter's birth. The court of appeals further cited *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), for that case's discussion of the treatment of aliens: "The Court observed that judicial inquiry into immigration legislation is limited in deference to the "long recognized" power of the political branches of the government to "expel or exclude **aliens**." Cir. Opinion, App., at 7 (emphasis added). The court of appeals further cited with favor *United States v. Wong Kim Ark*, 169 U.S. 649, 702-703 (1897): "(Holding that the legislative power to prescribe a uniform rule of naturalization

reaches to the bestowal of United States citizenship upon **foreigners** and upon **foreign-born** children of United States citizens alike)". Cir. Opinion, App., at 9 (emphasis added).

Consistent with the Ninth Circuit's treatment of the petitioner as foreign-born, she would qualify as a citizen of the United States by virtue of § 201(i) of the Nationality Act of 1940, added by the Act of July 31, 1946, 60 Stat. 721, App., at 26-27. That statute specially benefits the children of United States citizens where the parent had served honorably in the U. S. armed forces during World War II. The Ninth Circuit's treatment of the petitioner's immigration status as that of an alien necessitates an analysis of her qualifications under § 201(i) to prevent a manifest injustice.[5]

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[5] The Secretary of State adopted the District Court's decision in *Y.T. v. Bell*, 478 F. Supp. 828 (W.D.Pa. 1979), that the legitimation provision of § 205 of the Nationality Act of 1940 does not apply to the "war baby" provision of § 201(i). The retention requirement does not apply to the petitioner since she did not have awareness during her minority that her natural father was a U.S. citizen. Even if she had known the identity of her father during that time frame, she could not have had knowledge of her possession of United States citizenship because illegitimate war babies were not considered to be entitled to acquisition benefits at that time. The Department of State FOREIGN AFFAIRS MANUAL notes that: "Originally, it was held that Section 205NA applied to cases of children who were born out of wedlock and claimed citizenship under § 201(i)NA. However, in *Y.T. v. Bell*, 478 F. Supp. 828 (W.D. Pa. 1979), the court ruled that § 201(i)NA does not require the child to be legitimated in accordance with § 205NA in order to acquire U.S. citizenship" 7 FOREIGN AFFAIRS MANUAL § 1134.3.

The Philippine Independence Act signed into law on May 1, 1934, 48 Stat. 462, App., at 15-20, was in effect at the time of the petitioner's birth. Section 8(a)(1) of the Philippine Independence Act specifically provided for the consideration of the Philippine Islands as a separate country with a quota of 50 persons per fiscal year for the purposes of the laws relating to the immigration, exclusion, or expulsion of aliens. App., at 15. Section 8(a)(3) of that Act further specified that any foreign service officer assigned to duty in the Philippine Islands would be considered as stationed in a foreign country. App., at 16.

It was provided by section 8(a)(1) of the Philippine Independence Act that from May 1, 1934, until independence on July 4, 1946, that:

> For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this Section and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens.

Therefore, the very language of the Philippine Independence Act specifically considered the Philippines as if it were a foreign country, and Philippine citizens as aliens. The petitioner, as the daughter of a qualifying serviceman, who was born in the Philippines when it was treated as a foreign country by virtue of the statute, should be treated as being conferred with U. S.

citizenship at birth.[6] When it is considered that § 201(i) was enacted on July 31, 1946 after the Philippines had become independent, the petitioner's claim to citizenship as "(A) person born outside the United States and its outlying possessions" is bolstered by the historical context that faced the 1946 Congress.

CONCLUSION

The petitioner respectfully requests the Court to grant her petition, issue a writ of certiorari, reverse the judgment of the Ninth Circuit of the court of appeals and remand with instructions to affirm the judgment of the district court.

Respectfully submitted,

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[6] Since the Philippine Independence Act was in effect at the time of the petitioner's birth, Petitioner's mother, a national who had never taken up residence in the United States, was also treated as an alien under the law. *Mangoang v. Boyd*, 205 F.2d 553 (9th Cir. 1953); Cir. Opinion, App., at 7.

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed April 14, 1995.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LUZVISAMINDA ABLANG, *Plaintiff-Appellee,* v. JANET RENO,* Attorney General, et al., *Defendants-Appellants.*	No. 93-56129 D.C. No. CV-92-05476-IH OPINION

Appeal from the United States District Court for the Central District of California Irving Hill, Senior District Judge, Presiding

Argued and Submitted
February 8, 1995 – Pasadena, California

Filed April 14, 1995

Before: Stephen S. Trott, Ferdinand F. Fernandez, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

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* Janet Reno is substituted for her predecessor William P. Barr, Attorney General of the United States, pursuant to Fed.R.App.P. 43(c)(1).

SUMMARY

Immigration/Citizenship/Individual Rights

The court of appeals reversed a distict court judgment and remanded. The court held that a statute that requires a child born abroad and out of wedlock to a United States citizen father and an alien mother to establish paternity by the age of majority in order to be deemed a United States citizen, is not unconstitutional.

Appellee Luzvisaminda Ablang was born out of wedlock in the Philippines to a Filipino mother and a United States citizen father. Ablang was unaware of her true parentage until after her graduation from high school.

Ablang applied for a Certificate of Citizenship from the Immigration and Naturalization Service. She submitted affidavits from her father acknowledging his paternity, as well as the results of genetic testing. Both of her applications were denied. The government did not dispute paternity. The government based its denial of Ablang's request to be recognized as a United States citizen on her failure to have been legitimated or to have had her paternity adjudicated by the age of majority, as required by § 205 of the Nationality Act of 1940.

Ablang filed a complaint with the district court seeking a declaratory judgment of her United States citizenship. The court found § 205 to be unconstititonal as a violation of the Equal Protection Clause, and awarded summary judgment to Ablang, declaring her to be a United States citizen. The government appealed.

[1] The citizenship statutes applicable in this case were §§ 201(e) and 205 of the Act. The Act requires that a child born abroad and out of wedlock to a United States citizen father and an alien mother establish paternity by the age of majority in order to be deemed a United States citizen. A child born abroad and out of wedlock to a United States citizen mother and alien father is deemed a United States citizen provided the mother has met the residency requirement; nothing further is required of the child.

[2] Section 205 does not revoke a previous grant of citizenship. Citizenship does not inhere under the Act unless and until paternity is established, provided this takes place by the age of majority.

[3] There is a rational basis for the statute's requirement of proof of paternity. When children are born out of wedlock, the government naturally requires proof of paternity before determining someone to be the legal father. In most cases, there is a reasonable expectation that the legitimate child's maternal descent will be easier to trace than her paternal descent. The birth certificate as a rule lists the name of the birth mother. [4] In addition, the government put forth facially bona fide and legitimate reasons for the time limitations of § 205. While the burden placed on the illegitimate child of a United States citizen father in requiring her to establish paternity while still a child is a heavy one, it could not be said that Congress's desire to promote early ties to this country and to those relatives who are citizens of this country was not a rational basis for the requirements made by § 205. The statutory sections in question are not unconstitutional.

COUNSEL

John S. Koppel, United States Department of Justice, Washington, D.C., for the defendants-appellants.

Charles M. Miller, The Miller Law Offices, Studio City, California, for the plaintiff-appellee.

OPINION

T.G. NELSON, Circuit Judge:

I

United States Attorney General Janet Reno and Secretary of State Warren Christopher appeal the district court's award of summary judgment to Luzvisaminda Ablang in her action challenging the constitutionality of section 205 of the Nationality Act of 1940, 54 Stat. 1137, and seeking a declaratory judgment that she is a United States citizen. We reverse the district court's decision and remand.

II

FACTS AND PROCEDURAL HISTORY

The facts of this case are undisputed. Luzvisaminda Ablang was born out of wedlock in the Philippines on June 8, 1946, to a Filipino mother and a United States citizen father stationed in the Philippines during World

War II.[1] Her father, Walter Simmerson, left the Philippines before she was born. Lacking resources, Ablang's mother gave her shortly after birth to another family, which raised but never legally adopted her. Ablang was unaware of her true parentage until her natural mother came to see her some time after her graduation from high school. Her mother informed her that her father was a United States citizen, whom she believed to be deceased. In 1981, Ablang nonetheless wrote to her father at an old address provided by her mother. He responded, and they met for the first time in 1987.

In 1990, Ablang applied for a Certificate of Citizenship from the INS, and in 1991 for a United States passport. She submitted affidavits from her father acknowledging his paternity, as well as the results of genetic testing showing her to be Simmerson's daughter by a 95.77% probability. Both of her applications were denied. The Government does not dispute that Ablang is Simmerson's daughter. It acknowledges that Simmerson "fits the parental requirement." It bases its denial of her request to be recognized as a United States citizen on her failure to have been legitimated or to have had her paternity adjudicated by the age of majority, as required by section 205 of the Nationality Act of 1940.

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[1] The Philippines were an outlying possession of the United States until July 4, 1946. We note we have held that birth in the Philippines during the territorial period does not constitute birth in the United States under the Citizenship Clause of the Fourteenth Amendment. *Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1994). Ablang does not, however, base her claim to United States citizenship solely upon birth in a United States territory.

After her applications were denied, Ablang filed a complaint with the district court seeking a declaratory judgment of her United States citizenship. The district court found section 205 to be unconstitutional as a violation of the equal protection clause, and awarded summary judgment to Ablang, declaring her to be a United States citizen. The Government timely filed this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

III

DISCUSSION

A. Standard of Review

A grant of summary judgment is reviewed *de novo. Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir. 1994). Review of a decision to grant or deny declaratory relief is *de novo. Tashima v. Administrative Office of the United States Courts,* 967 F.2d 1264, 1273 (9th Cir. 1992). " 'Although the decision to grant or deny declaratory relief . . . is a matter initially committed to the discretion of the district court, on appeal we exercise our own "sound discretion" to determine the propriety of the district court's grant or denial of declaratory relief.' " *Dexter v. Kirschner,* 984 F.2d 979, 982 (9th Cir. 1993) (quoting *Fireman's Fund Ins. Co. v. Ignacio,* 860 F.2d 353, 354 (9th Cir. 1988)).

B. Analysis

[1] "The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's

birth." *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990). The statutes applicable here are sections 201(e) and 205 of the Nationality Act of 1940 ("the Act").[2] Section 201(e) confers citizenship on:

> [a] person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person.

Section 205 provides as to illegitimate children:

> The provisions of section 201, [subsection] . . . (e) . . . hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.
>
> In the absence of such legitimation or adjudication, the child . . . if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

The Act thus requires that a child born abroad and out of wedlock to a United States citizen father and an alien mother establish paternity by the age of majority in order to be deemed a United States citizen. A child born abroad and out of wedlock to a United States citizen mother and

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[2] The Nationality Act of 1940 was repealed in 1952, by statutes which have themselves since been repealed. The contemporary equivalents of § 201(e) and § 205 of the Act are to be found in 8 U.S.C. § 1401(e) and § 1409.

alien father is deemed a United States citizen provided the mother has met the residency requirement; nothing further is required of the child.

In its order of April 28, 1993, the district court found section 205 to be violative of the Equal Protection Clause because it "takes away" the citizenship granted in section 201 on an unjustifiably discriminatory basis. In other words, Ablang argues, section 205 imposes a "condition subsequent" to retention of the United States citizenship previously granted her by section 201. We do not agree. Even if section 205 could be read as implying a condition subsequent, it is established that Congress may impose such conditions. *Rogers v. Bellei*, 401 U.S. 815, 831, 834 (1971).

[2] But we do not read section 205 as revoking a previous grant of citizenship. We agree with the Government that citizenship does not inhere under the Act unless and until paternity is established, provided this takes place by the age of majority. The question before us is whether the Act unlawfully discriminates between: 1) classes of children born abroad to an alien and a United States citizen parent, on the basis of legitimacy; or 2) classes of illegitimate children, born abroad to an alien and a United States citizen parent, on the basis of the United States citizen parent's gender.

In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Supreme Court upheld the constitutionality of 8 U.S.C. § 1101(b)(1)(D), a statute which excluded natural fathers and their illegitimate children from the special preference immigration status granted by the Immigration and Nationality Act to aliens who qualify as the children or

parents of United States citizens or lawful permanent residents. The Court observed that judicial inquiry into immigration legislation is limited in deference to the "long recognized" power of the political branches of the Government to "expel or exclude aliens." *Id.* at 792; *see also United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1897) (holding that the legislative power to prescribe a uniform rule of naturalization reaches to the bestowal of United States citizenship upon foreigners and upon foreign-born children of United States citizens alike). While *Fiallo* requires the courts to limit the scope of review of immigration laws in deference to Congress, it does not preclude review. "The Court's position has always been that cases alleging constitutional infirmities in the immigration laws are subject to judicial review." *Ventura-Escamilla v. INS*, 647 F.2d 28, 31 (9th Cir. 1981).

While " 'Congress regularly makes rules that would be unacceptable if applied to citizens,' " *Fiallo*, 430 U.S. at 792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)), it must nevertheless have a "facially legitimate and bona fide reason" for enacting a discriminatory rule. *Fiallo*, 430 U.S. at 792-94. We have held, and here affirm, that the "facially legitimate and bona fide reason" test is equivalent to the rational basis test typically applied in equal protection cases. *Wauchope v. United States Dept. of State*, 985 F.2d 1407, 1414 n.3 (9th Cir. 1993).

Applying the facially legitimate and bona fide reason test, the *Fiallo* Court concluded that, "Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems

of proof that usually lurk in paternity determinations," and held the statute to be "not unconstitutional." *Id.* at 799.[3]

In *Wauchope*, we held that section 1993 of the Revised Statutes of 1874, which awarded United States citizenship to the foreign-born offspring of United States citizen fathers, but not to the foreign-born offspring of United States citizen mothers, was unconstitutional. 985 F.2d at 1416. Whereas *Fiallo* concerned the right of aliens to equal protection under the special preference immigration laws, *Wauchope* concerned the right of United States citizen mothers to transmit citizenship to their children born abroad according to the same standards set for United States citizen fathers.[4] The Government's explanation for the disparity in treatment between men and women involved the United States' efforts to discourage dual citizenship. The argument was that foreign countries were less apt to confer citizenship on the children of United States citizen fathers than those of United States citizen mothers, so allowing mothers to pass on their

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[3] Congress has since rewritten 8 U.S.C. § 1101(b)(1)(D) in terms that equalize the relationship between natural mothers and fathers and their children.

[4] *Wauchope* was brought by children born abroad on behalf of their United States citizen mothers. The children were deemed to have standing to proceed on behalf of their mothers under *Powers v. Ohio*, 111 S.Ct. 1364, 1370-71 (1991), because: 1) they had suffered an injury-in-fact, 2) they were closely related to the parties on whose behalf the action was brought, and 3) their mothers were deceased, and thus no longer able to press their own claims. *Wauchope*, 985 F.2d at 1411. In the case before us, Ablang has standing only to proceed on her own behalf, as her father is still alive. Her standing as such is not disputed.

United States citizenship was more likely to result in dual citizenship. *Id.* at 1415. Inasmuch as a significant majority of countries confer citizenship in a gender-neutral fashion on persons born upon their soil, we deemed this argument "simply incorrect," and held that the Government had "failed to set forth a facially legitimate and bona fide reason to justify the statute's unequal treatment of citizen men and women." *Id.* at 1416.

We now turn to the case before us to determine whether the government has proposed a rational basis for the statute here in question. There are two prongs to the condition imposed upon illegitimate children by section 205 of the Act: proof of paternity, and the time limit for legitimation. In reviewing the two prongs, two questions must be considered: 1) is there a rational basis for the distinction between legitimate and illegitimate children? and 2) is there a rational basis for the distinction between illegitimate children born to United States citizen mothers and those born to United States citizen fathers?

Ablang argues that there is no rational basis for the paternity requirement because in *her* case there is no unresolved question of paternity: the Government concedes that she is the daughter of Walter Simmerson, a United States citizen who was eligible to transmit his citizenship to Ablang at birth. Ablang misses the point; the peculiarities of her case are not decisive. Rather, there must be some discernible rational basis for the legislature's decision to distinguish the class to which she belongs.

The Congress need not have stated its rationale for the distinction in the text or legislative history. "Where a

statute is assessed pursuant to a deferential standard of review, 'it is constitutionally irrelevant whether the justification proffered by the government was in fact the reasoning that generated the legislative classification.' " *Id.* at 1415 (quoting *United States v. Barajas-Guillen*, 632 F.2d 749, 754 (9th Cir. 1980)). "However, courts 'need not in equal protection cases accept at face value assertions of legislative purposes, when . . . the asserted purpose could not have been a goal of the legislation.' " *Id.* (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)).

[3] We conclude there is a rational basis for the statute's requirement of proof of paternity. Clearly, an illegitimate child cannot claim citizenship via *jus sanguinis* until her parentage is established. In the case of legitimate children, most states make a presumption of paternity (rebuttable or otherwise) that determines the husband to be the child's legal father. When children are born out of wedlock, there is no such presumption, and the Government naturally requires proof of paternity before determining someone to be the legal father. While in Ablang's case, her connection to both her mother and her father was broken early in infancy, in most cases there is a reasonable expectation that the illegitimate child's maternal descent will be easier to trace than her paternal descent. The birth certificate (destroyed in Ablang's case by white ants, according to records officials) as a rule lists the name of the birth mother.

As for the time limitation, the Government observes that proof may be harder to obtain as the years go by, and suggests that Congress has an interest in promoting "close family ties." The Government cites the following notes from *Fiallo* in support of its conclusions:

> The inherent difficulty of determining the paternity of an illegitimate child is compounded when it depends upon events that may have occurred in foreign countries many years earlier.

430 U.S. at 799 n.8.

> Appellants insist that the statutory distinction is based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children, and that existing administrative procedures, which had been developed to deal with the problems of proving paternity, maternity and legitimation with respect to statutorily recognized "parents" and "children," could easily handle the problems of proof involved in determining the paternity of an illegitimate child. We simply note that this argument should be addressed to the Congress rather than the courts.

Id. at 799 n.9.

[4] While we are aware of the increasing use and reliability of blood and genetic testing to establish paternity, we hold that the Government has put forth facially bona fide and legitimate reasons for the time limitation of section 205 of the Act. We acknowledge that the burden placed on the illegitimate child of a United States citizen father in requiring her to establish paternity while still a child is a heavy one. But we cannot say that Congress's desire to promote early ties to this country and to those relatives who are citizens of this country is not a rational basis for the requirements made by section 205 of the Act. Thus, we hold that the statutory sections in question are not unconstitutional.

For the foregoing reasons, the decision of the district court is

REVERSED and the case is REMANDED with instructions to dismiss the complaint with prejudice.

APPENDIX B

SECTIONS 8-16 OF THE PHILIPPINE INDEPENDENCE ACT, MAY 1, 1934, 48 STAT. 462-464.

SEC. 8.(a) Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 17 –

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. This paragraph shall not apply to a person coming or seeking to come to the Territory of Hawaii who does not apply for and secure an immigration or passport visa, but such immigration shall be determined by the Department of the Interior on the basis of the needs of industries in the territory of Hawaii.

(2) Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the continental United States from the Territory of Hawaii (whether entering such Territory before or after the effective date of this section) unless they belong to a class declared to be nonimmigrants by section 3 of the Immigration Act of 1924 or to a class declared to be nonquota immigrants under the provisions of section 4 of such Act other than subdivision (c) thereof, or unless they were admitted to such Territory under an immigration visa.

The Secretary of Labor shall be regulations provide a method for such exclusion and for the admission of such excepted classes.

(3) Any Foreign Service officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may prescribe, during which assignment such officer shall be considered as stationed in a foreign country; but his powers and duties shall be confined to the performance of such of the official acts and notarial and other services, which such officer might properly perform in respect of the administration of the immigration laws if assigned to a foreign country as a consular officer, as may be authorized by the Secretary of State.

(4) For the purposes of sections 18 and 20 of the Immigration Act of 1917, as amended, the Philippine Islands shall be considered to be a foreign country.

(b) The provisions of this section are in addition to the provisions of the immigration laws now in force, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws not inapplicable, shall apply to and be enforced in connection with the provisions of this section. An alien, although admissible under the provisions of this section, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this section, and an alien, although admissible under the provisions of the immigration laws other than this section, shall not be admitted to the United States if he is excluded by any provision of this section.

(c) Terms defined in the Immigration Act of 1924 shall, when used in this section, have the meaning assigned to such terms in that Act.

SEC. 9. There shall be no obligation on the part of the United States to meet the interest or principal of bonds and other obligations of the government of the Philippine Islands or of the Provincial and municipal governments thereof, hereafter issued during the continuance of United States sovereignty in the Philippine Islands: *Provided*, That such bonds and obligations hereafter issued shall not be exempt from taxation in the United States or by authority of the United States.

RECOGNITION OF PHILIPPINE INDEPENDENCE AND WITHDRAWAL OF AMERICAN SOVEREIGNTY

SEC. 10. (a) On the 4th day of July immediately following the expiration of a period of ten years from the date of the inauguration of the new government under the constitution provided for in this Act the President of the United States shall be proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such naval reservations and fueling stations as are reserved under section 5), and, on behalf of the United States, shall recognize the independence of the Philippine Islands as a separate and self-governing nation and acknowledge the authority and

control over the same of the government instituted by the people thereof, under the constitution then in force.

(b) The President of the United States is hereby authorized and empowered to enter into negotiations with the government of the Philippine Islands, not later than two years after his proclamation recognizing the independence of the Philippine Islands, for the adjustment and settlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement the matter of naval reservations and fueling stations shall remain in its present status.

NEUTRALIZATION OF PHILIPPINE ISLANDS

SEC. 11. The President is requested, at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved.

NOTIFICATION TO FOREIGN GOVERNMENTS

SEC. 12. Upon the proclamation and recognition of the independence of the Philippine Islands, the President shall notify the governments with which the United States is in diplomatic correspondence thereof and invite said governments to recognize the independence of the Philippine Islands.

TARIFF DUTIES AFTER INDEPENDENCE

SEC. 13. After the Philippine Islands have become a free and independent nation there shall be levied,

collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from other foreign countries: *Provided*, That at least one year prior to the date fixed in this Act for the independence of the Philippines Islands, there shall be held a conference of representatives of the Government of the United States and the government of the Commonwealth of the Philippine Islands, such representatives to be appointed by the President of the United States and the Chief Executive of the Commonwealth of the Philippine Islands, respectively, for the purpose of formulating recommendations as to future trade relations between the Government of the United States and the independent government of the Philippine Islands, the time, place, and manner of holding such conference to be determined by the President of the United States; but nothing in this proviso shaft be construed to modify or affect in any way any provision of this Act relating to the procedure leading up to Philippine independence or the date upon which the Philippine Islands shall become independent.

IMMIGRATION AFTER INDEPENDENCE

SEC. 14. Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.

CERTAIN STATUTES CONTINUED IN FORCE

SEC. 15. Except as in this Act otherwise provided, the laws now or hereafter in force in the Philippine Islands shall continue in force in the Commonwealth of the Philippine Islands until altered, amended, or repealed by the Legislature of the Commonwealth of the Philippine Islands or by the Congress of the United States, and all references in such laws to the government or officials of the Philippines or Philippine Islands shall be construed, insofar as applicable, to refer to the government and corresponding officials respectively of the Commonwealth of the Philippine Islands. The government of the Commonwealth of the Philippine Islands shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof. Except as otherwise provided in this Act, all laws or parts of laws relating to the present government of the Philippine Islands and its administration are hereby repealed as of the date of the inauguration of the government of the Commonwealth of the Philippine Islands.

SEC. 16. If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

* * *

APPENDIX C

RELEVANT PORTIONS OF NATIONALITY ACT OF 1940 ADDED BY THE ACT OF JULY 31, 1946, 60 STAT. 721.

Act of October 14, 1940

(54 STAT. 1137)

An Act to revise and codify the nationality laws of the United States into

> a comprehensive nationality code, approved October 14, 1940, as amended and supplemented. Secs. 346 (a-h), (1) and 347 repealed by the Act of June 25, 1948 (62 Stat. 683), *see* p. 1314 of the Appendix. Second paragraph of sec. 323 repealed by the Act of August 16, 1951 (65 Stat. 191), *see* p. 1030. Repealed by the Act of June 27, 1952 (66 Stat. 280), *see* p. 199.

NATIONALITY ACT OF 1940

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the nationality laws of the United States are revised and codified as follows:

TITLE I

TITLE OF ACT

Section 1. This act may be cited as the Nationality Act of 1940. (54 Stat. 1137; 8 U.S.C. 907.)

Chapter I – Definitions
DEFINITIONS AS USED IN THE ACT

Sec. 101. For the purposes of this Act –

(a) The term "national" means a person owing permanent allegiance to a state.

(b) The terms "national of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien.

(c) The term "naturalization" means the conferring of nationality of a state upon a person after birth.

(d) The term "United States" when used in a geographical sense means the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States.

(e) The term "outlying possessions" means all territory, other than as specified in subsection (d), over which the United States exercises rights of sovereignty, except the Canal Zone.

(f) The term "parent" includes in the case of a posthumous child a deceased parent.

(g) The term "minor" means a person under twenty-one years of age. (54 Stat. 1137; 8 U.S.C. 501.)

Sec. 102. For the purpose of chapter III of this Act –

(a) The term "State" includes (except as used in subsection (a) of section 301) Alaska, Hawaii, the District

of Columbia, Puerto Rico, and the Virgin Islands of the United States.

(b) The term "naturalization court," unless otherwise particularly described, means a court authorized by subsection (a) of section 301 to exercise naturalization jurisdiction.

(c) The term "clerk of court" means a clerk of a naturalization court.

(d) The terms "Commissioner" and "Deputy Commissioner" means the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(e) The term "Attorney General" means the Attorney General of the United States.

(f) The term "Service" means the Immigration and Naturalization Service of the United States Department of Justice.

(g) The term "designated examiner" means an examiner or other officer of the Service designated under section 333 by the Commissioner.

(h) The term "child" includes a child legitimated under the law of the child's residence or domicile, whether in the United States or elsewhere; also a child adopted in the United States, provided such legitimation or adoption takes place before the child reaches the age of sixteen years and the child is in the legal custody of the legitimating or adopting parent or parents. (54 Stat. 1138; U.S.C. 502.)

Sec. 103. For the purpose of subsections (a), (b), and (c) of section 404 of this Act, the term "foreign state" includes outlying possessions of a foreign state, but does not include self-governing dominions or territory under mandate, which for the purposes of these subsections, shall be regarded as separate states. (54 Stat. 1138; U.S.C. 503.)

Sec. 104. for the purposes of sections 201, 307(b), 403, 404, 405, 406, and 407 of this Act, the place of general abode shall be deemed the place of residence. (54 Stat. 1138; 8 U.S.C. 504.)

Chapter II – Nationality At Birth

NATIONALS AND CITIZENS OF THE UNITED STATES AT BIRTH

Sec. 201. The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jurisdiction thereof;

(b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property.

(c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;

(d) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(f) A child of unknown parentage found in the United States, until shown not to have been born in the United States;

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years; *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States or an international agency of an official character in which the United States participates, for which he receives a substantial compensation. (54 Stat. 1138-1139; 8 U.S.C. 601.)

CHILD BORN ABROAD SUBSEQUENT TO MAY 24, 1934

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934. (54 Stat. 1139; 8 U.S.C. 601.)

(i) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who has served or shall serve honorably in the armed forces of the United States after December 7, 1941, and before the date of the termination of hostilities in the present war as proclaimed by the President or determined by a joint resolution by the Congress and who prior to the birth of such person has had 10 years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of 12 years, the other being an alien: *Provided*, That in order to retain such citizenship, the child must reside in the United States or its outlying

possessions for a period or periods totaling 5 years between the ages of 13 and 21 years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of 16 years, or if he resides abroad for such a time that it becomes impossible for him to complete the 5 years' residence in the United States or its outlying possessions before reaching the age of 21 years, his American citizenship shall thereupon cease.[38]

PERSONS BORN IN PUERTO RICO ON OR AFTER APRIL 11, 1899

Sec. 202. All persons born in Puerto Rico on or after April 11, 1899, subject to the jurisdiction of the United States, residing on the effective date of this Act in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are hereby declared to be citizens of the United States. (54 Stat. 1139; 8 U.S.C. 602.)

PERSONS BORN IN THE CANAL ZONE OR REPUBLIC OF PANAMA ON OR AFTER FEBRUARY 26, 1904

Sec. 203. (a) Any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen

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[38] Sec. (i) added by Act of July 31, 1946 (60 Stat. 721; 8 U.S.C. 601), *see* p. 1018.

of the United States, is declared to be a citizen of the United States. (54 Stat. 1139; 8 U.S.C. 603.)

(b) Any person born in the Republic of Panama on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States employed by the Government of the United States or by the Panama Railroad Company, is declared to be a citizen of the United States. (54 Stat. 1138; 8 U.S.C. 603.)

NATIONALS BUT NOT CITIZENS OF THE UNITED STATES AT BIRTH

Sec. 204. Unless otherwise provided in section 201, the following shall be nationals, but not citizens, of the United States at birth:

(a) A person born in an outlying possession of the United States of parents one of whom is a national, but not a citizen, of the United States;

(b) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have resided in the United States, or one of its outlying possessions prior to the birth of such person. (54 Stat. 1139; 8 U.S.C. 604.)

FOUNDLINGS

(c) A child of unknown parentage found in an outlying possession of the United States, until shown not to

have been born in such outlying possession. (54 Stat. 1189; 8 U.S.C. 604.)

ILLEGITIMATE CHILDREN

Sec. 205. The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status. (54 Stat. 1139-1140; 8 U.S.C. 605.)

* * *

APPENDIX D

DECISION OF THE DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, TRANSCRIPT OF PROCEEDINGS, AT 30-54, DATED APRIL 19, 1993.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

LUZVISAMINDA ABLANG,

PLAINTIFF,

VS. CV 92-5476-IH

WILLIAM BARR, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL,

DEFENDANT.

TRANSCRIPT OF PROCEEDINGS
APRIL 19, 1993
LOS ANGELES, CALIFORNIA

RICHARD A. FISCHER
OFFICIAL COURT REPORTER
436 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
213-626-2625

* * *

* * *

[p. 30] THE COURT: IT IS MY TENTATIVE DECISION, COUNSEL, TO GRANT THE PLAINTIFF'S MOTION AND TO DENY THE GOVERNMENT'S MOTION.

AGAIN, AS STATED EARLIER, THERE'S NO BONA FIDE DISPUTE OF MATERIAL FACT, AND I PROPOSE TO FIND THAT THE PLAINTIFF HAS SHOWN ENTITLEMENT TO JUDGMENT AS SOUGHT BY HER AS A MATTER OF LAW, AND TO HOLD THAT THE DEFENDANT GOVERNMENT HAS NOT SHOWN ENTITLEMENT TO JUDGMENT.

THE REASONING BEHIND THIS IS AS FOLLOWS: I WOULD TENTATIVELY HOLD THAT SECTION 205 IS UNCONSTITUTIONAL AS A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

WHAT WE HAVE IN THIS STATUTORY PATTERN, AS I STATED EARLIER, IS A BLANKET GRANT OF CITIZENSHIP IN SECTION 201 FOR A GROUP, WHICH INCLUDES THE PLAINTIFF. THEN WE HAVE A LATER ATTEMPT TO TAKE IT AWAY – OR LIMIT THAT BLANKET GRANT, AND TAKE IT AWAY FROM [p. 31] PLAINTIFF BECAUSE PLAINTIFF IS ILLEGITIMATE.

THE TAKE-AWAY SECTION, 205, APPLIES ONLY WHEN THE AMERICAN CITIZEN PARENT IS A MAN, THE FATHER. IT DOESN'T APPLY TO SITUATIONS

WHERE THE AMERICAN CITIZEN PARENT IS THE MOTHER. MOREOVER, IT REQUIRES THAT THE ACTS OF LEGITIMATION OR COURT ADJUDICATION BE UNDERTAKEN AND COMPLETED DURING THE MINORITY OF THE CHILD.

I PROPOSE TO FIND THAT SECTION 205 IS UNCONSTITUTIONAL AS BOTH A SEXIST DISCRIMINATION AND BECAUSE THE LEGITIMATION REQUIREMENT IMPOSED ON THE CHILD IS NOT RATIONALLY RELATED TO ANY GOVERNMENTAL PURPOSE, AND, THUS, IS FACIALLY VOID.

WE HAVE TO MAKE A SOMEWHAT DETAILED CONSTITUTIONAL ANALYSIS HERE UNDER THE DECIDED CASES.

THE FIRST QUESTION THE COURT MUST CONSIDER IS STANDING. IN MY VIEW PLAINTIFF CLEARLY HAS STANDING, AND THE GOVERNMENT DOES NOT DISPUTE THAT STANDING EXISTS.

FOR AN INTELLIGENT AND PERSUASIVE DISCUSSION OF STANDING WHICH SUPPORTS THE COURT'S POSITION SEE THE OPINION OF DISTRICT JUDGE SAROKIN IN LEBRUN VERSUS THORNBERG. IT IS CITED BY AT LEAST ONE SIDE HERE. THE CASE IS FOUND AT 777 FED SUPP, 1204, DECIDED IN THE DISTRICT OF NEW JERSEY IN 1991.

[p. 32] NOT ONLY IS LEBRUN AN IMPORTANT AUTHORITY ON STANDING, WHICH IS NOT A CONTESTED ISSUE IN MY CASE, IT IS ALSO AN IMPORTANT AND PERSUASIVE AUTHORITY TO SUPPORT THE TENTATIVE CONSTITUTIONAL HOLDING I HAVE ANNOUNCED. AND IN THAT RESPECT, HOWEVER, THERE IS OTHER AUTHORITY TO SUPPORT IT AS WELL.

CONTINUING WITH THE COURT'S TASK: IN LOOKING AT THE VALIDITY OF A CONGRESSIONAL

STATUTE, WHICH AS THESE STATUTES DO IMPOSE DISCRIMINATORY AND EXTRA BURDENSOME REQUIREMENTS ON ILLEGITIMATE CHILDREN AS AGAINST LEGITIMATE CHILDREN, AND WHICH ADD EXTRA REQUIREMENTS ON ILLEGITIMATE CHILDREN OF AMERICAN FATHERS AS AGAINST ILLEGITIMATE CHILDREN OF AMERICAN MOTHERS, THE COURT MUST DETERMINE THE STANDARD OF CONSTITUTIONAL REVIEW UNDER THE EQUAL PROTECTION CLAUSE.

THERE HAVE BEEN A TOTAL, I THINK, OF THREE POSSIBLE STANDARDS ENUNCIATED BY THE SUPREME COURT FOR A REVIEW OF LEGISLATIVE ENACTMENTS UNDER THE EQUAL PROTECTION CLAUSE. I CAN'T BE ABSOLUTELY SURE ABOUT THAT BECAUSE THE SUPREME COURT HAS NOT MADE IT CRYSTAL CLEAR THAT THERE ARE THREE SEPARATE STANDARDS. HOWEVER, SOME OPINIONS INDICATE THAT THERE ARE AND COMMENTATORS HAVE SAID THAT THERE ARE THREE SEPARATE STANDARDS.

THEY ARE AS FOLLOWS. ONE, STRICT SCRUTINY; TWO, INTERMEDIATE SCRUTINY, WHICH THE LAW PROFESSORS [p. 33] AFFECTIONATELY CALL – AND I'M QUOTING – RATIONAL BASIS WITH BITE. AND THEN, OF COURSE, THE THIRD STANDARD IS RATIONAL BASIS.

THE STRICT SCRUTINY STANDARD CANNOT AND SHOULD NOT BE USED HERE BECAUSE IT REQUIRES A DISCRIMINATION OR DIFFERENTIATION AS TO A GROUP WHICH CAN BE CALLED A SUSPECT CLASS.

ILLEGITIMATE CHILDREN ARE NOT YET, NOT YET RECOGNIZED AS A SUSPECT CLASS, SO THE STRICT SCRUTINY STANDARD IS NOT AVAILABLE.

IN MY VIEW THE INTERMEDIATE STANDARD IS ARGUABLY THE STANDARD THAT OUGHT TO BE USED HERE. THE INTERMEDIATE STANDARD IS USED WHEN THE COURT DEALS WITH DISCRIMINATION OR DISPARATE TREATMENT OF A GENDER, OR AS BETWEEN NATURAL AND ILLEGITIMATE CHILDREN. THESE CLASSES ARE ENTITLED TO CONSIDERABLE PROTECTION AGAINST DISCRIMINATORY TREATMENT.

THE STATUTE, IF IT DEALS WITH GENDER DISCRIMINATION OR DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN, MUST BE SUBSTANTIALLY RELATED – LET ME EMPHASIZE AGAIN – SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF A LEGITIMATE GOVERNMENT INTEREST.

NOW THAT'S THE DEFINITION FOR INTERMEDIATE STANDARD. AND THE DEFINITION AND REQUISITE FOR THE LOWEST STANDARD, THE STRAIGHT RATIONALLY RELATED [p. 34] REQUIREMENT IS, OF COURSE, LESS.

IT CAN BE ARGUED, AS THE GOVERNMENT DOES HERE, THAT SINCE THE STATUTES WE'RE LOOKING AT DEAL WITH THE CONFERRING OF CITIZENSHIP ON ALIENS, THAT SINCE THEY DEAL WITH IMMIGRATION MATTERS, ONLY THE LOWEST STANDARD RATIONAL RELATIONSHIP SHOULD BE APPLIED.

NOW, THAT'S AN INTERESTING ARGUMENT AND WE COULD SPEND A LONG TIME DISCUSSING WHICH ONE OF THOSE TWO STANDARDS, INTERMEDIATES OR LOWEST, SHOULD BE APPLIED HERE, AND HOW THE VARIOUS SUPREME COURT AND CIRCUIT COURT CASES AFFECT THE APPROACH OF THE COURT TO THAT QUESTION. BUT I REALLY DON'T THINK IT IS NECESSARY OR PRODUCTIVE TO ENGAGE IN THAT LENGTHY DISCUSSION.

IN MY VIEW WHICHEVER ONE IS APPLIED, THE INTERMEDIATE OR THE LOWEST, SECTION 205 CANNOT SURVIVE CONSTITUTIONALLY.

AGAIN, THE FIRST MAJOR POINT IN THE ANALYSIS TO REACH THAT RESULT IS THAT SECTION 201 IS A BLANKET GRANT OF CITIZENSHIP, AND SECTION 205 TAKES IT AWAY AFTER THE BLANKET GRANT FOR CERTAIN KINDS OF ILLEGITIMATE CHILDREN, WHILE CONFERRING IT MUCH MORE EASILY, IF NOT TOTALLY, FOR OTHER KINDS OF ILLEGITIMATE CHILDREN, NAMELY, THOSE BORN TO AMERICAN CITIZEN MOTHERS.

THE LEGISLATIVE HISTORY OF THE NATIONALITY ACT OF [p. 35] 1940 WAS SUPPLIED TO US, I THINK, BY THE GOVERNMENT, BUT IT'S NOT OF ANY HELP. IT'S BARREN OF ANY JUSTIFICATION FOR SECTION 205. THE GOVERNMENT ADMITS THAT, AND ADMITS THAT THE LEGISLATIVE HISTORY JUST DOESN'T MENTION THE LEGITIMATION ISSUE.

THERE IS SOME REFERENCE IN THE LEGISLATIVE HISTORY TO PROBLEMS OF DUAL NATIONALITY AND AMERICANIZATION AS A JUSTIFICATION, BUT THOSE REFERENCES SEEM TO ME AS BEING GERMANE TO OTHER PROVISIONS OF THE ACT, PROVISIONS OF THE IMPOSED RETENTION REQUIREMENTS.

OTHER PROVISIONS OF THE ACT REQUIRE APPLICANTS OF CITIZENSHIP TO HAVE RESIDED IN THIS COUNTRY FOR A CERTAIN PERIOD OF TIME.

AND THOSE ARE JUST NOT RELEVANT TO OUR STATUTORY SECTION. AND EVEN IF THEY WERE, THE RETENTION REQUIREMENTS APPLY EQUALLY TO CHILDREN OF AMERICAN FATHERS AND MOTHERS, WHICH 205 DOES NOT.

SO THE LEGISLATIVE HISTORY IS UNHELPFUL.

BUT SOMETHING WHICH IS VERY HELPFUL IS AN OPINION, AN IMPORTANT ONE, FROM OUR NINTH CIRCUIT HANDED DOWN WITHIN THE LAST COUPLE OF MONTHS. IT GUIDES THIS COURT, I BELIEVE, TOWARD THE CONCLUSIONS THAT I HAVE TENTATIVELY ENUNCIATED. YOU KNOW THE CASE. THE CASE IS CALLED WAUCHOPE VERSUS U.S. DEPARTMENT OF [p. 36] STATE. YOU WILL FIND IT IN THE ADVANCED SHEETS AT 985 FED 2ND 1407. THE OPINION WAS FILED FEBRUARY 16 OF THIS YEAR.

IN THAT CASE THE NINTH CIRCUIT STRUCK DOWN A SECTION OF AN EARLIER NATIONALITY ACT GOVERNING THE GRANT OF CITIZENSHIP. THE SECTION INVOLVED IN THAT CASE GRANTED CITIZENSHIP TO CHILDREN BORN OUTSIDE THE LIMITS OF THE U.S. IF THEY WERE CHILDREN OF AMERICAN FATHERS, BUT NOT TO CHILDREN OF AMERICAN MOTHERS BORN THERE.

THE COURT APPLIED THE RATIONAL BASIS TEST, THE LOWEST REQUIREMENT, MY TEST NUMBER THREE. THEY SAID THEY WERE APPLYING A TEST AS TO WHETHER A FACIALLY LEGITIMATE AND BONA FIDE REASON EXISTED TO JUSTIFY THE DISCRIMINATION.

APPLYING THAT TEST, WHICH IS THE TEST MOST BENEFICIAL TO THE GOVERNMENT, THE NINTH CIRCUIT HAD NO DIFFICULTY IN FINDING NO FACIALLY LEGITIMATE AND BONA FIDE REASON TO SUPPORT A GENDER BASED DISCRIMINATION.

SO WE HAVE EXACTLY THAT KIND OF GENDER BASE DISCRIMINATION IN THE INSTANT CASE. I TOLD YOU THAT JUDGE SAROKIN'S OPINION IN LEBRUN SUPPORTED THE DECISION THAT I HAVE TENTATIVELY MADE.

IN THAT CASE HE SEEMS TO HAVE IMPOSED THE INTERMEDIATE TEST; BUT HE, TOO, REACHED THE CONCLUSION THAT EVEN UNDER THE THIRD TEST, THE LOWEST ONE, THE [p. 37] STATUTE HE WAS DEALING WITH COULD NOT SURVIVE BECAUSE IT VIOLATED EQUAL PROTECTION.

IN THAT CASE JUDGE SAROKIN WAS CONSTRUING SECTION 2011 OF THE NATIONALITY ACT OF 1940, AND SECTION 301 AND 309 OF THE IMMIGRATION AND NATIONALITY ACT OF 1952.

301 BEING CONSTRUED THERE ALSO REQUIRED, JUST AS OUR STATUTE DOES, THAT THE CHILD SEEKING A DECLARATION OF CITIZENSHIP BE RECOGNIZED AND ACKNOWLEDGED BY HER FATHER BEFORE SHE BECAME 21.

THAT'S WHAT OUR STATUTE IS ABOUT. THAT'S WHAT OUR STATUTE REQUIRES, ALTHOUGH OUR STATUTE GIVES THE CHILD ONE OTHER METHOD OF COMPLYING; NAMELY, GETTING THAT COURT ORDER.

IN THAT CASE, JUDGE SAROKIN'S CASE, THE PLAINTIFF WAS RECOGNIZED AND LEGITIMATED JUST AS OURS WAS, BUT IT HAPPENED WHEN THE CHILD WAS 35 YEARS OLD, AND IN THE YEAR IN WHICH THE FATHER DIED.

THE COURT STRUCK DOWN THE STATUTE AS UNLAWFUL DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN, AND ALSO AS UNLAWFUL DISCRIMINATION THAT WAS GENDER BASED.

THE COURT THERE ALSO EMPHASIZED THAT THERE WAS IN THE BEGINNING A BLANKET GRANT OF CITIZENSHIP, JUST LIKE OUR STATUTORY SCHEME, AND THEN A TAKE-AWAY PROVISION BASED ON THE REQUIREMENT THAT THE CHILD RESIDE IN THE U.S. FOR A CERTAIN PERIOD OF TIME.

IF THE CHILD FAILED [p. 38] TO SO RESIDE, THE CITIZENSHIP GIVEN BY THE GRANT PROVISION WAS YANKED AND TAKEN AWAY.

LET ME INTRUDE HERE BY SAYING THAT OUR PLAINTIFF HAS SOUGHT AS AN ALTERNATIVE BASIS FOR RELIEF TO BE CONSIDERED UNDER 2011 OF THE STATUTE, THE SECTION THAT WAS INTERPRETED BY JUDGE SAROKIN IN LEBRUN. PLAINTIFF SAYS I OUGHT TO IGNORE THE FACT THAT EVERYBODY INVOLVED IN THIS CASE AGREES THAT THE PHILIPPINES WERE AN OUTLYING POSSESSION OF THE U.S. WHEN THIS WOMAN WAS BORN, AND I SHOULD CONSTRUE MY CASE AS ONE IN WHICH THE PLAINTIFF WAS BORN AT A PLACE OUTSIDE THE U.S. OR ITS OUTLYING POSSESSIONS.

I WILL REJECT THAT RATIONALE AND THAT EFFORT AND WILL NOT USE THAT ALTERNATIVE ARGUMENT IN ANY WAY TO SUPPORT MY DECISION TODAY.

AS JUDGE SAROKIN SAID, AND I ADOPT THE STATEMENT FOR MY CASE, THE STATUTE WAS – AND I'M QUOTING – DISCRIMINATORY IN ITS IMPACT ON CHILDREN BORN OUT OF WEDLOCK AND SEXIST IN MAKING CITIZENSHIP DEPEND ON THE ACT, THE ESSENCE OF THE MALE PARENT ONLY.

THE QUOTE I HAVE JUST READ YOU IS FOUND AT 777 FED SUPP AT PAGE 1206.

WELL, YOU'VE HEARD MY TENTATIVE VIEWS. I'M SORRY THEY TOOK SO LONG. THE CASE IS INTERESTING AND COMPLEX AND THAT'S WHY THEY TOOK SO LONG.

[p. 39] I WILL HEAR FROM COUNSEL, WITH GOVERNMENT COUNSEL, MR. JOHNSON, FIRST.

MR. JOHNSON: I WOULD JUST MAKE SOME PRELIMINARY COMMENTS FIRST, YOUR HONOR.

AS THIS COURT IS WELL AWARE THIS CASE ESSENTIALLY INVOLVES IMPORTANT SEPARATION OF POWERS ISSUES.

AS THE COURT IS AWARE –

THE COURT: I DON'T KNOW EXACTLY WHAT YOU MEAN. PERHAPS YOU CAN AMPLIFY THAT.

MR. JOHNSON: UNDER ARTICLE ONE OF THE CONSTITUTION, CONGRESS HAS SOLE POWER TO RULE IN THE AREA OF NATURALIZATION AND CITIZENSHIP. THE QUESTION IS –

THE COURT: BUT NOT IN AN UNCONSTITUTIONAL FASHION.

MR. JOHNSON: PARDON ME, YOUR HONOR?

THE COURT: BUT NOT IN AN UNCONSTITUTIONAL FASHION INVOLVING UNCONSTITUTIONAL DISCRIMINATION WHICH AMOUNTS TO DENIAL OF EQUAL PROTECTION.

MR. JOHNSON: THAT'S CORRECT, YOUR HONOR.

GENERALLY, HOWEVER, CONGRESS IS SOLELY CONFERRED WITH THE POWER TO GRANT CITIZENSHIP, AND IN THE ABSENCE OF A STATUTORY BASIS TO GRANT CITIZENSHIP THE COURTS DO NOT HAVE THE POWER TO GRANT CITIZENSHIP.

[p. 40] THE COURT: WELL, YOU HEARD THE ANALYSIS WE HAVE IN 201E, A GRANT. THEN WE HAVE A LATER TAKE-AWAY, WHICH THE COURT HAS DECLARED UNCONSTITUTIONAL, OR INTENDS TO, IF THE TENTATIVE VIEW IS ADOPTED.

MR. JOHNSON: THE COURT IS UNDOUBTEDLY WELL AWARE OF THE DISSENT BY JUDGE POOLE IN THE WAUCHOPE CASE?

THE COURT: I SAW IT.

MR. JOHNSON: JUDGE POOLE CITED THE SUPREME COURT CASE –

THE COURT: BY THE WAY, IT'S CERTAINLY A BARE-BONES DISSENT. I REALLY DON'T KNOW ON WHAT GROUNDS HE DISSENTED.

MR. JOHNSON: WAUCHOPE STATES, YOUR HONOR, THAT ONCE IT'S BEEN DETERMINED THAT THE PERSON DOES NOT QUALIFY FOR CITIZENSHIP, THE COURT LACKS – THE DISTRICT COURTS LACK THE DISCRETION TO IGNORE THE DEFECTS AND GRANT THE CITIZENSHIP, AND THAT NEITHER BY THE APPLICATION OF A DOCTRINE OF ESTOPPEL OR BRAND THE CASE OF EQUITABLE POWERS OR ANY OTHER MEANS DOES THE COURT HAVE THE POWER TO CONFER CITIZENSHIP IN VIOLATION OF CONGRESS' LIMITATIONS.

THE COURT: BY THE WAY, I THINK IT WAS YOU WHO EVEN CITED THAT CASE.

DO YOU KNOW IF THERE'S A MANDATE DOWN OR IF ANY [p. 41] FURTHER PROCEEDINGS ARE CONTEMPLATED BY THE GOVERNMENT?

MR. JOHNSON: IN WAUCHOPE?

THE COURT: YES.

MR. JOHNSON: YES, I DO, YOUR HONOR.

ON MARCH 31, 1993, WHICH WAS LESS THAN THREE WEEKS AGO, THE GOVERNMENT FILED A PETITION FOR REHEARING WITH THE NINTH CIRCUIT. THAT CASE IN OUR VIEW IS ORIGINALLY PENDING BEFORE THE NINTH CIRCUIT.

THE COURT: IT HASN'T BEEN ACTED ON YET.

MR. JOHNSON: THERE HAS BEEN NO –

THE COURT: THEREFORE, NO MANDATE IS DOWN YET, RIGHT?

MR. JOHNSON: TO MY KNOWLEDGE THERE IS NO MANDATE.

IF THE COURT HERE HAS STATED THAT PLAINTIFF WAS GIVEN CITIZENSHIP, AND THEN IN A SEPARATE SECTION OF THE NATIONALITY ACT OF 1940 THAT CITIZENSHIP WAS TAKEN AWAY, DEFENDANT RESPECTFULLY DISAGREES.

THE SUPREME COURT HAS REPEATEDLY RECOGNIZED THAT CONGRESS ALONE GRANTS CITIZENSHIP, AND THAT STARTING –

THE COURT: CONGRESS QUIT WITH 201E. THERE IS A GRANT, ISN'T THERE?

MR. JOHNSON: THE SECTIONS HAVE TO BE READ IN THE CONTEXT, THOUGH, YOUR HONOR.

THE COURT: WELL, BUT 201 COMES BEFORE [p. 42] 205, AND THERE'S A GRANT IN 201, A BLANKET GRANT FOR WHICH THIS PLAINTIFF IS QUALIFIED; THEN I CHOOSE TO CALL 205, WHICH IS ADMITTEDLY A PART OF THE SAME STATUTE, ENACTED ON THE SAME DAY, A LATER TAKE-AWAY PROVISION RESTRICTING A BROADER GENERAL GRANT.

MR. JOHNSON: THE SUPREME COURT IN ROGERS V BELL, YOUR HONOR HAS STATED THAT

THE PROPER EMPHASIS IS NOT ON WHAT THE STATUTE PERMITS, THE PLAINTIFF TO GAIN FROM THE POSSIBLE STARTING POINT OF OBTAINING CITIZENSHIP, BUT RATHER THE EMPHASIS IS ON WHAT – ON THE STARTING POINT OF – OF LACKNESS OF CITIZENSHIP RATHER THAN THE STARTING POINT OF BEING IN POSSESSION OF CITIZENSHIP.

IN THE SUPREME COURT CASE, FIALLO V BELL, THE SUPREME COURT UPHELD THE STATUTE THAT DISCRIMINATED BETWEEN MOTHERS AND FATHERS OF ILLEGITIMATE CHILDREN.

THE COURT: SPELL THE FIRST NAME FOR THE REPORTER.

MR. JOHNSON: F-I-A-L-L-O VERSUS BELL, B-E-L-L.

THE COURT: GO AHEAD.

MR. JOHNSON: IN THAT CASE THE SUPREME COURT UPHELD THE STATUTE THAT'S DISCRIMINATED BETWEEN MOTHERS AND FATHERS OF ILLEGITIMATE CHILDREN REGARDING THE ISSUE OF FAMILY REUNIFICATION. THE SUPREME COURT –

[p. 43] THE COURT: REGARDING THE ISSUE OF WHAT? I'M SORRY. I DIDN'T HEAR YOU.

MR. JOHNSON: FAMILY REUNIFICATION.

IN FIALLO THE SUPREME COURT HELD THAT CONGRESS ACTED, PERHAPS, BECAUSE OF A PERCEIVED ABSENCE OF CLOSE FAMILY TIES AND BECAUSE OF PROBLEMS OF PROOF OF PATERNITY. THE SUPREME COURT IN FIALLO HELD THAT IN

ANY EVENT, HOWEVER, IT IS NOT A JUDICIAL ROLE IN CASES OF THIS SORT TO PROBE AND TEST THE JUSTIFICATIONS FOR A PARTICULAR ACTION BY CONGRESS.

THE SUPREME COURT IN FIALLO ALSO STATED THAT COMPLAINTS ABOUT IMMIGRATION POLICIES BASED ON OVERBROAD AND OUTDATED STEREOTYPES SHOULD BE ADDRESSED TO CONGRESS AND NOT TO THE COURTS.

THE COURT: I DON'T THINK I'M TALKING ABOUT OVERBROAD OR OUTDATED STEREOTYPES HERE.

GO AHEAD.

MR. JOHNSON: ALTHOUGH THE LEGISLATIVE HISTORY OF THE 1940 ACT DOES NOT – WAS NOT SPECIFICALLY CLEAR ON THIS ISSUE, THERE IS AN INDICATION THAT CONGRESS WAS CONCERNED ABOUT – ABOUT THE FACT THAT – THAT PEOPLE CLAIMING ENTITLEMENT TO U.S. CITIZENSHIP SHOULD HAVE SOME FAMILIARITY WITH THE BASIC PREDICATE OF CITIZENSHIP, SHOULD HAVE SOME BASIC FAMILIARITY WITH THE CONCEPT OF DEMOCRACY.

[p. 44] TO THAT EXTENT CONGRESS HAD LEGIT – HAD PROPER CONCERNS –

THE COURT: CHILDREN OF AMERICAN FATHERS HAVE LESS FAMILIARITY WITH DEMOCRACY THAN THE CHILDREN OF AMERICAN MOTHERS?

MR. JOHNSON: WELL, I – I UNDERSTAND THAT THERE IS –

THE COURT; YOU THINK ILLEGITIMATE CHILDREN HAVE LESS FAMILIARITY WITH DEMOCRACY THAN, NECESSARILY, LEGITIMATE CHILDREN?

I DON'T THINK THAT CAN BE UTILIZED AS A JUSTIFICATION FOR THIS DISCRIMINATORY TREATMENT AT ALL.

MR. JOHNSON: WELL, SECTION 205 DOES STATE THAT – THAT IF THE MOTHER HAD NATIONALITY OF THE UNITED STATES AT THE TIME OF THE BIRTH, THAT THE CHILD WOULD BE HELD TO ACQUIRE AT BIRTH HER NATIONALITY STATUS.

THE COURT: YES. IF THE CHILD IS IN, WITHOUT MORE, IF THE CHILD IS ONE OF AN AMERICAN MOTHER, BUT LOOK AT THE DIFFERENCE IN TREATMENT IF THE CHILD IS ONE OF AN AMERICAN FATHER.

IF THAT ISN'T A SEXIST DISCRIMINATION, WHAT IS?

MR. JOHNSON: THE STATUTE DOESN'T NECESSARILY PROVIDES EXIST TREAT – DIFFERENT TREATMENT BASED ON THE STATUS OF THE MOTHER OR THE FATHER.

[p. 45] THE COURT: THE CHILD DOESN'T HAVE TO DO ANYTHING DURING HER MINORITY OR OTHERWISE IF SHE WAS BORN TO AN AMERICAN MOTHER, BUT THEY REQUIRE HER TO DO ALMOST IMPOSSIBLE AFFIRMATIVE ACTIONS DURING

MINORITY TO QUALIFY IF SHE WAS BORN TO AN AMERICAN FATHER.

I JUST DON'T THINK THAT'S A DISCRIMINATION. I THINK THAT IS DISPARATE TREATMENT THAT CANNOT STAND.

MR. JOHNSON: IF I MAY REVIEW MY NOTES?

THE COURT: I WILL GIVE YOU ANOTHER FEW MINUTES TO WIND UP. THERE IS ANOTHER IMPORTANT MATTER IF THE COURT ADOPTS ITS TENTATIVE VIEW THAT HAS TO BE DISCUSSED. WE WILL GET TO THAT, BUT I WANTED TO GIVE YOU AN OPPORTUNITY TO MAKE ALL THE POINTS YOU FEEL YOU WISH TO MAKE. I HAVE, OF COURSE, READ CAREFULLY YOUR PAPERS.

MR. JOHNSON: I UNDERSTAND, YOUR HONOR.

I HAVE NOTHING ADDITIONAL.

THE COURT: ALL RIGHT. MR. MILLER, WHY DON'T YOU COME UP AND TELL ME YOUR VIEW OF FIALLO VERSUS BELL AND WHY THE GOVERNMENT'S RELIANCE ON IT IS MISPLACED IN THIS CONTEXT IF THAT IS WHAT YOU BELIEVE.

HOLD ON A SECOND.

GO AHEAD.

MR. MILLER; THANK YOU, YOUR HONOR.

MAY IT PLEASE THE COURT, FIALLO WAS A [p. 46] CONSTITUTIONAL CHALLENGE DENYING

PREFERENCE CLASSIFICATION TO ILLEGITIMATE CHILDREN.

HOWEVER, AS THE NINTH CIRCUIT POINTED OUT IN THE WAUCHOPE CASE, IN THAT CASE ALIEN WAS NOT IN DISPUTE. THE CHILDREN WERE CLEARLY ALIENS AT THE TIME, DISTINGUISHED FROM THIS CASE WHERE THE PLAINTIFF HAD A STRONG CLAIM TO CITIZENSHIP.

THE COURT: WHEREAS IN OUR CASE WHAT?

MR. MILLER: OUR CASE THE PLAINTIFF HAS A STRONG CLAIM TO CITIZENSHIP. IT'S NOT CLEARLY AN ALIEN, WHILE IN FIALLO, THE PEOPLE THEY WERE TRYING TO BRING IN, THOSE PEOPLE WERE CLEARLY ALIENS. SO THE CONSTITUTION WOULD ALLOW DIFFERENT TREATMENT OF PEOPLE THAT ARE ALIENS.

THE COURT: WELL, I THINK NO FURTHER ARGUMENT IS NECESSARY. THE CASES ARE DISTINGUISHABLE; I MEAN FIALLO.

I NOW ADOPT THE TENTATIVE RESULT. I GRANT THE PLAINTIFF'S MOTION AND DENY THE GOVERNMENT'S FOR THE REASONS STATED.

I THINK YOU WILL WANT TO GET A TRANSCRIPT BECAUSE I DON'T WANT TO REPEAT IT AT GREAT LENGTH WHAT I HAVE SAID. I WILL INCORPORATE THE TRANSCRIPT BY REFERENCE.

WILL YOU GET IT, PLEASE.

MR. MILLER: THANK YOU, YOUR HONOR.

[p. 47] THE COURT: ALL RIGHT. NOW, THIS IS A PROBLEM THAT HAS TO BE DISCUSSED AT THIS POINT.

I PROPOSE TO WRITE MY OWN JUDGMENT, BUT WE HAVE TO TALK ABOUT ONE ASPECT. THE MOTION THAT YOU MAKE SOUGHT TWO THINGS: AN ORDER REQUIRING THE ISSUANCE OF A CERTIFICATE OF CITIZENSHIP, AND AN ORDER REQUIRING THE ISSUANCE OF A PASSPORT.

I WONDER IF YOU HAVE GIVEN A THOUGHT TO THE APPROPRIATENESS OF EITHER OR BOTH? FOR EXAMPLE, EVEN IF THE ORDER REQUIRING THE ISSUANCE OF A CERTIFICATE OF CITIZENSHIP IS OKAY, CLEARLY IF THIS COURT SHOULD ORDER THE ISSUANCE OF A PASSPORT, ONCE YOU HAVE A CERTIFICATE OF CITIZENSHIP YOU WILL GET A PASSPORT IN DUE COURSE.

SO AT THE MOST IT WOULD SEEM TO ME, AGAIN TENTATIVELY THAT THE COURT SHOULD ISSUE AN ORDER ONLY FOR A CERTIFICATE OF CITIZENSHIP.

SECOND, LET ME POINT OUT THAT JUDGE SAROKIN IN LEBRUN, CONFRONTED IN THAT CASE WITH A REQUEST BY THE PLAINTIFF TO BE ADMITTED TO CITIZENSHIP WOUND UP THE OPINION BY A REMAND TO THE I.N.S., AND I QUOTE: A REMAND FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. CLOSED QUOTE.

NOW, I'M NOT OVERLY TAKEN WITH THAT KIND OF A DISPOSITION. I WILL BE FRANK WITH YOU. IT

LENDS ITSELF TO POSSIBLY LENGTHY BUREAUCRATIC DELAYS IN COMPLIANCE [p. 48] WITH THE COURT'S ORDER AND IN GETTING A CERTIFICATE OF CITIZENSHIP INTO THE HANDS OF THE PLAINTIFF.

I'M SUGGESTING THAT THE TWO OF YOU MAY WISH TO CONFER, AND I DON'T KNOW. MAYBE MR. JOHNSON IS PREPARED NOW OR HE MAY WANT TO TALK TO HIS SUPERIORS BEFORE ANNOUNCING A POSITION ON THE TYPE AND NATURE OF RELIEF THAT THIS COURT SHOULD ORDER.

MR. JOHNSON, HAVE YOU RUN INTO THIS PROBLEM IN OTHER CASES? I KNOW YOU HANDLE IMMIGRATION MATTERS THERE. WHAT'S YOU'RE THINKING?

MR. JOHNSON: IN TERMS OF WHETHER OR NOT THERE MIGHT BE A DELAY?

THE COURT: THE FORM OF JUDGMENT THIS COURT SHOULD ISSUE? THERE ARE AT LEAST THREE POSSIBILITIES THAT I HAVE DISCUSSED.

FIRST, ORDER AS PRAYED THE ISSUANCE, IMMEDIATE ISSUANCE BY THE GOVERNMENT OF A CERTIFICATE OF CITIZENSHIP.

SECOND, ORDER AS PRAYED THE IMMEDIATE ISSUANCE BY THE GOVERNMENT OF A PASSPORT.

AND THIRD, REMAND TO I.N.S. FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

THERE MAY BE OTHERS; INTERMEDIATE STEPS, TOO.

UNFORTUNATELY NEITHER OF YOU DISCUSSED THE APPROPRIATE FORM OF JUDGMENT IN YOUR PAPERS.

[p. 49] MR. JOHNSON: CONSISTENT WITH JUDGE SAROKIN, YOUR HONOR, WE WOULD REQUEST THAT THE MATTER BE REMANDED. IF THE COURT WISHES, A TIME LIMIT CAN BE PLACED ON THE NATURE OF THAT REMAND.

THE COURT: WELL, BUT YOU HAVE TO NOT ONLY ASK ME FOR THAT, BUT YOU HAVE TO JUSTIFY THAT REQUEST.

THE PRECISE PRAYER OF THE MOTION, WHICH YOU DID NOT DISCUSS IN YOUR OPPOSITION, SAID: GIVE US NOW A CERTIFICATE AND A PASSPORT.

NOW YOU RESIST THAT, APPARENTLY.

MR. JOHNSON: YES, SIR.

THE COURT: I'D LIKE TO KNOW ON WHAT BASIS.

DO YOU WANT TO COME BACK TOMORROW OR WEDNESDAY TO DISCUSS THAT FURTHER?

MR. JOHNSON: I'D PREFER THAT, YOUR HONOR.

THE COURT: HAVE YOU EVER RUN INTO THIS PROBLEM BEFORE?

MR. JOHNSON: I HAVE NOT.

MR. MILLER: YES, YOUR HONOR.

THE COURT: HOW ABOUT YOU, MR. MILLER?

MR. MILLER: YES, YOUR HONOR.

THE COURT: I TAKE IT YOU SPEND MUCH OF [p. 50] YOUR PRACTICE IN IMMIGRATION MATTERS.

MR. MILLER: HUNDRED PERCENT, YOUR HONOR. IN THESE CASES WE ASK THE COURT TO – ESPECIALLY AS HERE, WHERE THE PLAINTIFF HAS WAITED THREE YEARS FOR THE COURT'S ORDER, OR FOR THE GRANT OF CITIZENSHIP, WE ASK THE COURT TO ISSUE AT LEAST THE CERTIFICATE OF CITIZENSHIP FORTHWITH. THE REASON –

THE COURT: WELL, I HEARD IT. BUT AGAIN I NEED AUTHORITY AND RATIONALE. NORMALLY, A COURT IS HESITANT TO ORDER AN ADMINISTRATIVE AGENCY TO DO SOMETHING.

I CAN'T GRANT THIS CERTIFICATE OF CITIZENSHIP. YOU'D AGREE WITH THAT?

MR. MILLER: YES, YOUR HONOR.

THE COURT: THE I.N.S. HAS TO DO THAT, I GUESS.

MR. MILLER: THAT IS CORRECT, YOUR HONOR.

THE COURT: NOW, IT MAY BE THAT I SHOULD ORDER THE I.N.S. JUST TO DO IT FORTHWITH.

BUT YOU NOW GET INTO A MATTER OF FUNCTION AND POWERS AND PROPER RESPECT BY THE COURT FOR THE EXECUTIVE BRANCH AND THE ADMINISTRATIVE AGENCY.

I'D LIKE YOU TO BE ABLE TO BRIEF ME ON THIS REQUEST OF YOURS. YOU MAY BE RIGHT. AND I AM DISPOSED TO DO IT THE WAY YOU ASKED ME TO DO IT. FIRST, BECAUSE [p. 51] THE GOVERNMENT DIDN'T OPPOSE AND, SECONDLY, I WANT TO AVOID ANY BUREAUCRATIC DELAY.

MR. JOHNSON SAYS I CAN PUT A TIME LIMIT ON IT. I WONDER IF YOU'D CONFER. THERE MUST BE SOMETHING IN THE JURISPRUDENCE, IN THE DECISIONS OF APPELLATE COURTS ABOUT THIS SUBJECT.

MR. MILLER: I'M NOT – I CAN'T THINK OF A SINGLE PRECEDENT, YOUR HONOR, THAT REACHES THIS ISSUE.

THE COURT: WELL, I HAVE JUST READ YOU ONE. THAT'S JUDGE SAROKIN IN LEBRUN.

MR. MILLER: YOUR HONOR, I CAN FIND OUT WHAT OTHER COURTS HAVE ORDERED IN THIS MATTER. I HAVE GOT –

THE COURT: BEAR IN MIND THAT JUST BECAUSE ANOTHER DISTRICT COURT HAS DONE OR NOT DONE SOMETHING DOES NOT NECESSARILY MAKE IT RIGHT.

I WANT TO KNOW THE LEGAL BASIS FOR THE REQUEST, AND THE LEGAL BASIS FOR OPPOSING IT, IF THERE IS ONE.

AND I THINK THE OFFICE HERE AND PARTICULARLY THE U.S. ATTORNEY WILL BE VERY CANDID AND FORTHCOMING ABOUT IT. YOU HAVE TO HAVE SOME BASIS FOR RESISTING AN ORDER BY THE COURT. RIGHT, MR. JOHNSON?

MR. JOHNSON: YES, YOUR HONOR.

THE COURT: YOU CAN'T JUST SAY I WISH YOU [p. 52] WOULD NOT ORDER IT. I'D LIKE TO KNOW THE LEGAL BASIS.

AND THE PLAINTIFF HAS SAID SOMETHING BESIDES I WISH YOU WOULD ORDER THE CERTIFICATE.

IN VIEW OF THE FACT THAT I'M THE JUDICIAL BRANCH AND THEY'RE THE EXECUTIVE BRANCH AND THEY HAVE THE POWER TO ISSUE CERTIFICATES, I WANT TO BE SURE IN MY OWN MIND THAT THAT'S THE APPROPRIATE KIND OF RELIEF.

SO HOW DO YOU WANT TO HANDLE IT? DO YOU WANT TO CONFER WITH EACH OTHER AND COME BACK SOME DAY LATER THIS WEEK?

IF YOU COME TO AN AGREEMENT, CALL THE CLERK AND TELL HIM THAT YOU'VE COME TO AN AGREEMENT ON AN APPROPRIATE FORM OF RELIEF AND YOU WON'T HAVE TO COME BACK.

MR. JOHNSON: THAT WOULD BE FINE, YOUR HONOR. WE MAY WELL BE ABLE TO AGREE TO IT AND PREPARE A PROPOSED ORDER FOR THE COURT.

THE COURT: I DIDN'T HEAR THAT ONE. I'M SORRY?

MR. JOHNSON: WE MAY – MR. MILLER AND I MAY BE ABLE TO COME TO AN AGREEMENT AND WE COULD SUBMIT TO THE COURT –

THE COURT: YES, I WOULD SUGGEST – WHAT'S THE STORY WEDNESDAY AFTERNOON, MR. CLERK?

THE CLERK: OPEN.

[p. 53] THE COURT: ARE YOU FOLKS AVAILABLE?

MR. MILLER: I AM, YOUR HONOR.

MR. JOHNSON: YES, YOUR HONOR.

THE COURT: LET'S MAKE IT A POINT FOR TWO O'CLOCK ON WEDNESDAY, AND GET ME EARLY IN THE MORNING WEDNESDAY. IF YOU'RE NOT COMING TO AN AGREEMENT, GET ME YOUR SHOWING, YOUR BRIEF, PLEASE, OR GIVE YOU A LITTLE MORE TIME. ARE YOU BOTH AVAILABLE THURSDAY?

MR. JOHNSON: YES, YOUR HONOR.

THE COURT: I THINK I AM, TOO, RIGHT, MR. CLERK?

THE CLERK: THAT YOU ARE.

MR. MILLER: WHAT TIME, YOUR HONOR?

THE COURT: THURSDAY AT TWO O'CLOCK. BUT I WOULD LIKE YOUR BRIEF IN HERE BY – IN CHAMBERS, THAT IS, BY 9:30 OF THE SAME DAY SO I CAN READ THEM.

MR. MILLER: IF I'M UNDERSTANDING CORRECTLY, YOUR HONOR, IF WE COME TO AN AGREEMENT BEFORE –

THE COURT: IF YOU COME TO AN AGREEMENT YOU DON'T EVEN HAVE TO COME. YOU MUST ADVISE THE COURT SOME WAY FORMALLY, IN WRITING OR FAX, OR SOMETHING, THAT YOU'VE COME TO AN AGREEMENT AND HERE'S WHAT THE ORDER OUGHT TO SAY.

IF YOU DISAGREE ON WHAT THE ORDER SHOULD SAY, I [p. 54] WILL WANT A BRIEF FROM EACH OF YOU TO SUPPORT YOUR VIEWS, AND I WANT IT IN TIME TO READ IT BEFORE WE MEET THURSDAY AT TWO O'CLOCK.

MR. MILLER: THANK YOU, YOUR HONOR.

MR. JOHNSON: YES, YOUR HONOR.

THE COURT: THAT MEANS THURSDAY MORNING AT 9:30 IN CHAMBERS WITH A BRIEF.

OKAY. THANKS VERY MUCH.

VERY INTERESTING PROBLEM OF CONSTITUTIONAL ADJUDICATION.

COURT'S ADJOURNED.

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ Richard A. Fischer, RPR DATED 4-24-93
RICHARD A. FISCHER, RPR
OFFICIAL COURT REPORTER

APPENDIX E

ORDER OF THE DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, DATE OF ENTRY APRIL 29, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LUZVISAMINDA ABLANG, Plaintiff, v. WILLIAM BARR, Attorney General of the United States of America, et al., Defendants.	NO. CV92-5476-IH ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed Apr. 28, 1993)

There came before the Court for hearing on April 19, 1993, mutual summary judgment motions of the parties. Plaintiff's motion was filed March 4, 1993. Defendants' motion was filed April 1, 1993. Previously, and again on April 19, 1993, counsel for both sides agreed in open court that the matter was ripe for decision and judgment in favor of one of the parties at this time. They further agreed there was no bona fide dispute of material fact which would preclude summary judgment for one of the parties at this time.

Appearances were: For plaintiff, Charles Miller, Esq., and Terry S. Miller, Esq.; for defendant, Terree Bowers,

United States Attorney by Michael C. Johnson, Esq., Assistant United States Attorney.

The Court, having considered the said motions and the evidence, points and authorities and other documents filed in support of each and in opposition to each, and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants' motion for summary judgment is denied. Defendant has not shown entitlement to judgment as a matter of law.

2. Plaintiff's motion for summary judgment is granted. Plaintiff has shown entitlement to judgment as a matter of law.

3. A transcript of the proceedings in open court on April 19, 1993, is ordered filed when produced. It is incorporated herein by reference. Said transcript shall constitute the Court's further findings of fact and conclusions of law as well as a statement of the Court's reasons.

4. Plaintiff Luzvisaminda Ablang is declared to be a citizen of the United States of America with all the privileges and immunities thereof. This includes the plaintiff's right to obtain forthwith upon this order becoming final, and upon her taking the oath of allegiance, a certificate of U.S. citizenship. (8 U.S.C. Sec. 1452(a)).

The Court expects that, upon plaintiff's receiving her certificate of U.S. citizenship, that she will be entitled to and will obtain, without any unnecessary delay whatsoever, a U.S. passport provided, of course, that plaintiff makes an application therefor and is not otherwise disqualified by law from obtaining a passport.

The court retains jurisdiction to issue in the future such additional orders as may be necessary or appropriate to carry out and implement this judgment.

5. The Clerk shall transmit a copy of this order by U.S. mail to all counsel of record.

DATED: April 28, 1993.

/s/ Irving Hill
IRVING HILL, Judge
United States District Court

APPENDIX F

MINUTE ORDER, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, DATED MAY 29, 1993.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV-292 - 5476-IH Date 5/27/93

Title Luzvisaminda Ablang vs. Attorney General of the United States of America, et al

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DOCKET ENTRY

PRESENT:

HON. IRVING HILL, JUDGE
R.H. MAZZARELLA — NONE
Deputy Clerk — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

NO APPEARANCES

PROCEEDINGS: IN CHAMBERS

Re: Defendants' Motion to Alter or Amend the Judgment, filed 5/13/93

Motion has been considered by the Court.
No opposition is necessary,
No hearing is necessary or appropriate,
Said motion is DENIED.

Initials of Deputy Clerk Illegible

APPENDIX G

DECISION OF THE PASSPORT AGENCY, ENTERED SEPTEMBER 11, 1991

[SEAL]

United States Department of State

Passport Agency

Federal Building, Room 13100
11000 Wilshire Boulevard
Los Angeles, California 90024-3615

Sep. 11, 1991

Mrs. Luzvisaminda Reso Ablang
10730 Avonbury Way
Whittier, California 90603

Dear Mrs. Ablang:

This is in reference to your application for a United States passport which you executed on May 30, 1991 at the Los Angeles Passport Agency.

A review of your file indicates that you were born on June 8, 1946 in Zumarraga, Samar, Philippines and it appears you have a claim to United States citizenship under Section 201(i) of the Nationality Act of 1940 through birth abroad to a United States citizen father and an alien mother. As a result you became subject to the retention provisions of Section 301(b) of the Immigration and Nationality Act of 1952. The retention provisions as originally enacted require your physical presence in the United States for a five-year period between the ages of fourteen and twenty-eight with absences during that

period totaling less than one year in the aggregate. Section 301(b) was amended in 1972 to require two years continuous physical presence in the United States between the ages of fourteen and twenty-eight with absences totaling less than sixty days provided the person was physically present on the first and last days of that two-year period.

A further review of your file indicates that you failed to comply with this retention provision and you therefore would have ceased to be a United States citizen on June 8, 1972 your twenty-sixth birthday.

You stated that you were unaware of a claim to U.S. citizenship. However, the unawareness doctrine is an extraordinary remedy to be used only when there is a compelling evidence of the applicant's total unawareness of a claim to U.S. citizenship. Unawareness does not exist if the applicant had the slightest idea that he/she might be a citizen. Based on the information contained in your baptismal certificate, it is logical to assume that you knew your father was an American. The affidavits you submitted also indicate that a knowledge of the citizenship status of your father existed outside immediate family circles. Additionally, although you allege no knowledge of your possible claim to U.S. citizenship prior to 1987, you establish that your father was an American on your 1979 marriage certificate.

In *Rucker v. Saxbe,* 552 F.2d 998 (1977) the U.S. Court of Appeals, Third Circuit indicated that unawareness of the requirements of Section 301(b), when accompanied by awareness of a possible claim to U.S. citizenship, does not prevent the application of the retention requirements.

This opinion is consistent with the Department's long-time belief that citizens are obliged to keep themselves informed of the duties imposed on them by their citizenship. In *Rucker,* the court found that the government has no affirmative duty to inform citizens residing abroad of changes in U.S. nationality laws on a continuing basis.

By law, a United States passport can be issued only to a citizen or national of the United States. Since you have presented no evidence to show that you reacquired United States citizenship in any manner, we are unable to issue you a United States passport and your application of May 30, 1991 must be disapproved.

The local office of the Immigration and Naturalization Service may be able to assist you by providing information about other travel documents or procedures for possible naturalization as a United States citizen. Once you reacquire United States citizenship, you may execute another application for a United States passport.

The United States Treasury has been requested to refund directly to you the $35.00 passport fee you submitted with your application. You should allow six to eight weeks for the processing and receipt of this refund. The $7.00 application fee cannot by law be refunded.

We regret that the facts of your case make it impossible to issue you a United States passport at this time.

Sincerely,

/s/ Sakae M. Hawley
(Mrs.) Sakae M. Hawley
Regional Director

Enclosures: Letter of No Record
Baptismal Record
Birth Certificate, W. Simmerson
Marriage Certificate
Military Discharge, W. Simmerson
School Record, W. Simmerson
Affidavit, W. Simmerson

APPENDIX H

DECISION OF THE PASSPORT AGENCY ENTERED OCTOBER 26, 1992.

[LOGO] United States Department of State

Passport Agency

Federal Building, Room 13100
11000 Wilshire Boulevard
Los Angeles, California 90024-3615

Mrs. Luzvisaminda Reso Ablang
10730 Avonbury Way
Whittier, California 90603

Dear Mrs. Ablang:

This is further to our letter of September 11, 1991, in which we stated our disapproval of your application for a United States passport which you executed on May 30, 1991, at the Los Angeles Passport Agency.

While our decision of September 11, 1991, to disapprove your passport application was correct, it now appears that the analysis of your case and the stated reasons for disapproving your passport application were inaccurate. This letter provides you with an accurate statement of the reasons for the disapproval.

A further review of your file has disclosed the previously overlooked fact that the Philippine Islands were in the possession of the United States until July 4, 1946. Since you were born in an outlying possession of the United States on June 8, 1946, you do not have a claim to United States citizenship under Section 201(i) of the Nationality Act of 1940, which section applies to a person born outside the United States and its outlying possessions. Nor

would you be subject to the retention provisions of Section 301(b) of the Immigration and Nationality Act of 1952.

It is now evident that you would have a claim to United States citizenship under Section 201(e) of the Nationality Act of 1940 by birth in an outlying possession of the United States, i.e., the Philippines, to a United States citizen father who had resided in the United States prior to your birth. The fact, which you admit, that you were born out of wedlock means that you became subject to the legitimation provisions of Section 205 of the Nationality Act of 1940. The first paragraph of Section 205 requires that, for the provisions of Section 201(e) of the Nationality Act of 1940 to apply as of the date of your birth, your paternity by your United States citizen father had to have been established, by legitimation, or adjudication of a competent court, during minority, i.e., before June 8, 1967, your twenty-first birthday.

A further review of your file indicates that you failed to comply with the provisions of Section 205 regarding the establishment of paternity by legitimation or adjudication of a competent court during minority. Therefore, you would have ceased to have any claim to United States citizenship on June 8, 1967, your twenty-first birthday.

Article IX of the Treaty of Paris between the United States and Spain of December 19, 1898, provided that Filipinos became noncitizen United States nationals and citizens of the Philippine Islands. According to your file, your mother was born on December 25, 1930, in the Philippines and thus apparently was a citizen of the Philippines

and a national, but not a citizen, of the United States at the time of your birth.

The second paragraph of Section 205 of the Nationality Act of 1940 provides for the determination of nationality in the case of a person who is born out of wedlock and there is an absence of legitimation or adjudication by a competent court to establish paternity before their twenty-first birthday, which is your case. As a result, under the provisions of the second paragraph of Section 205, you would have had the nationality of your mother, who evidently was a national, but not a citizen of the United States, as of your birth, since she had resided in an outlying possession of the United States, i.e., the Philippine Islands, prior to your birth.

You would have lost United States nationality, however, when the Philippines became independent and ceased to be a possession of the United States by proclamation of the President of the United States. On July 4, 1946, all citizens of the Philippines who had not acquired United States citizenship lost their United States nationality whether they resided in the Philippines or in the United States. Since you had not acquired United States citizenship by July 4, 1946, you were no longer a national of the United States.

As we wrote in our letter to you dated September 11, 1991, by law, a United States passport can be issued only to a citizen or national of the United States. Since you have presented no evidence to show that you acquired United States citizenship, or reacquired United States nationality in any manner, we are unable to issue you a

United States passport and your application of May 30, 1991 was appropriately disapproved.

Sincerely,

/s/ Sakae M. Hawley
(Mrs.) Sakae M. Hawley
Regional Director

APPENDIX I

DECISION OF THE DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ENTERED OCTOBER 29, 1992.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

REFER TO THIS FILE NO.

A70 026 586

DICIT/N600

Mrs. Luzvisaminda Reso Ablang
10730 Avonbury Way
Whittier, CA 90603

Date: OCT 29 1992

DECISION

Upon consideration, it is ordered that your *Application for Certificate of Citizenship* be denied for the following reasons:

SEE ATTACHED

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed *within 15 days* from the date of this notice. (18 days if this notice was received by mail). If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

___ Board of Immigration Appeals in Washington, D.C., on the enclosed Form I-290 A. (A fee of $50.00 is required).

XX **Commissioner on the enclosed Form I-290 B. (A fee of ~~$50.00~~ $110.00 required).**

If an appeal is desired, the Notice of Appeal shall be executed and filed with *this* office, together with *the required fee.* A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

Sincerely yours,

/s/ Illegible
District Director

cc: The Miller Law Offices
12441 Ventura Blvd.
Studio City, CA 91604

Enclosure(s)

Form 1 - 292
(Rev. 10-1-83)Y

The applicant, LUZVISAMINDA RESO ABLANG, a national of the Philippines, has filed an application for a Certificate of Citizenship on April 16, 1990, claiming to have acquired United States Citizenship through her father who was born in the United States.

The applicant claims birth in the Philippines on June 8, 1946. She asserts that she is the issue of Patrocinia Reso, who was born in the Philippines also, and Walter Simmerson, who was born in the United States.

At the time of her birth, applicant was a national of the United States.

The Philippine Islands were acquired from Spain by treaty ratified April 11, 1899. Those individuals residing

in the Philippines who did not elect to retain Spanish allegiance became United States nationals as of April 11, 1899. The applicant acquired such nationality under the Nationality Act of 1940, as a person born in the Philippines to a United States national parent on or after January 13, 1941, but before July 4, 1946. The United States recognized the Philippines as an independent nation on July 4, 1946. With such recognition, United States nationality was lost, whether residing in the islands or in the United States.

The applicant's claim to United States citizenship is governed by the provisions of Section 201(e) of the Nationality Act of 1940 by her birth in an outlying possession of the United States, i.e., the Philippines, to a United States citizen father who had resided in the United States prior to the birth of the child. The section states:

> "(e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;"

The applicant claims to be the illegitimate child of a United States citizen father.

Further, Section 205 of the Nationality Act of 1940 applies to the instant case; if a child is born out of wedlock, paternity has to be established during minority, by legitimation, or adjudication of a competent court.

The applicant asserts to have not been legitimated during minority.

The applicant asserts that the provisions of Section 201(i) of the Nationality Act of 1940 governs. It does not. Section 201(i) applies to a person born outside the United States and its outlying possessions to a citizen parent, the other an alien. The applicant was born in an outlying possession of the United States to a citizen parent, the other a national.

In view of the aforementioned facts and laws, the applicant is statutorily ineligible for the benefit sought. The application is therefore denied.

Attachments to Form I-292
State Dept. letter dated October 26, 1992
State Dept. letter dated September 11, 1991

APPENDIX J

DECISION OF THE INS ASSOCIATE COMMISSIONER, ENTERED DECEMBER 31, 1992.

[LOGO] **U.S. Department of Justice**

Immigration and Naturalization Service

---

425 Eye Street N.W.
Washington, D.C. 20536

FILE: A70 026 586 (LOS)

IN RE: Luzvisaminda Reso ABLANG

APPLICATION: Application for Certificate of Citizenship under Section 341(a) of the Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT:
The Miller Law Offices
12441 Ventura Boulevard
Studio City, CA 91604

This is an appeal from the October 29, 1992, decision of the district director, denying the application for a certificate of citizenship. The issue on appeal is whether the applicant acquired United States citizenship pursuant to section 201(i) of the Nationality Act of 1940. The appeal will be dismissed.

FACTS

The applicant claims to have been born in the Philippine Islands on June 8, 1946, out of wedlock. She asserts that her mother is Patrocinia Reso, born in the Philippines on December 25, 1930, and that her natural father is Walter

Simmerson, born in the United States on December 21, 1924, who served honorably in the armed forces of the United States between March 30, 1943, and January 20, 1946, part of that time in the Philippines. She claims that she was raised from infancy by Monico and Dominga Daclag, although they never adopted her, and that she did not learn of her true parentage until she finished high school. She began her search for her father and made contact with him in 1981. He confirmed that he was her father.

BACKGROUND

The district director did not dispute any of the above facts. On the basis of these facts, he determined that the applicable provisions of law were sections 201(e) and 205 of the Nationality Act of 1940. The applicant claimed that the applicable provision was section 201(i) of that Act. The district director concluded that the applicant did not qualify for citizenship under any of these provisions.

APPLICABLE LAW

The provisions of law in question are the following:

> Sec. 201. The following shall be nationals and citizens of the United States at birth:
>
> . . .
>
> (e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

. . .

(i) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who has served or shall serve honorably in the armed forces of the United States after December 7, 1941, and before the date of the termination of hostilities in the present war as proclaimed by the President or determined by a joint resolution by the Congress and who, prior to the birth of such person, has had 10 years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of 12 years, the other being an alien: *Provided,* That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling 5 years between the ages of 13 and 21 years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of 16 years, or if he resides abroad for such a time that it becomes impossible for him to complete the 5 years' residence in the United States or its outlying possessions before reaching the age of 21 years, his American citizenship shall thereupon cease.

Sec. 205. The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after

> the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

Nationality Act of 1940, ch. 2, §§ 201 and 205, 54 Stat. 1138-40 (1940), as amended by the Act of July 31, 1946, 60 Stat. 721 (1946), *repealed by* Immigration and Nationality Act, June 27, 1952, § 403(42), 66 Stat. 163, 280.

ANALYSIS

Although the Nationality Act of 1940 and earlier statutes have been repealed, citizenship rights acquired under those prior laws have been preserved. Immigration and Nationality Act § 405, 8 U.S.C. § 1101 note. Therefore, the determination of whether the applicant acquired United States citizenship at birth is made according to the law in effect at the time of her birth. *Montana v. Rogers*, 278 F.2d 68 (7th Cir. 1960), *aff'd sub nom. Montana v. Kennedy*, 366 U.S. 308 (1961).

The Philippine Islands were ceded to the United States by Spain in the Treaty of Paris, dated December 10, 1898, ratified on April 11, 1899, 2 Malloy, *Treaties* 1690, 30 Stat. 1754. They remained a United States possession until their independence was finally proclaimed and American sovereignty withdrawn effective July 4, 1946. Proclamation No. 2695, 60 Stat. 1352. The applicant was born on June 8, 1946, while the Philippine Islands were still a United States possession. Therefore, she was born in an outlying possession of the United States, not outside the United States and its outlying possessions, as she claims.

Subsection (e) is the only subsection of section 201 of the Nationality Act of 1940 that applies to persons born in an outlying possession of the United States. Since the applicant was born in an outlying possession of the United States, subsection (e) is the only subsection that applies to her. That subsection does not contain any requirement regarding the citizenship, nationality, or alienage of the second parent.

Section 205 of the Nationality Act of 1940 codified the circumstances under which children born out of wedlock could qualify for citizenship under subsections (c), (d), (e), and (g) of section 201. Previously, the Attorney General had determined that the traditional rule barring the descent of benefits from a father to an illegitimate child applied. 39 Opin. A.G. 556 (1937); 32 Opin. A.G. 162 (1920). He then held that a child legitimated under the law of his father's domicile at the time the legitimating act took place was entitled to have its status recognized, and said that a child thus legitimated was entitled to citizenship under section 1993 of the Revised Statutes, 48 Stat. 797; 39 Opin. A.G. 556, 557-558 (1937); 32 Opin. A.G. 162, 164-65 (1920).

The applicant's natural father did not establish paternity during the applicant's minority, or at any time, by legitimation or by adjudication of a competent court. Because she did not fulfill the requirements of section 205, the applicant's claim under section 201(e) must fail.

Subsection (i) applies only to persons born outside the United States and its outlying possessions. As shown above, the applicant was not born outside the United

States and its outlying possessions. For this reason, she does not qualify for citizenship under subsection (i).

Moreover, if somehow it could be concluded that the applicant was born outside the United States and its outlying possessions, subsection (i) confers citizenship on the offspring of a citizen parent and an alien parent. The applicant's mother, who was born in the Philippine Islands while they were under United States sovereignty, was a national of the United States, not an alien. *De La Ysla v. United States*, 77 F.2d 988 (9th Cir.), *cert. denied*, 296 U.S. 575 (1935).

Applicant's reliance on section 8(a)(1) of the Philippines Independence Act, Act of March 24, 1934, ch. 84, § 8, 48 Stat. 463, is misplaced. That section explicitly states that, "[f]or the purposes of . . . laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens." Applicant contends that her mother should be considered to have been an alien at the time of the applicant's birth for purposes of section 201(i) on this basis. However, the quoted section clearly specifies the purposes for which citizens of the Philippines were to be considered as aliens. The descent of citizenship does not relate to immigration, exclusion, or expulsion. Therefore, the applicant's mother may not be considered to have been an alien for purposes of determining her child's citizenship.

The applicant asserts that the district director's decision defies logic because he says that section 201(i) applies to a person born outside the United States and its outlying

possession to a citizen parent and an alien parent. However, this is what the statutory provision explicitly states.

Subsection 201(i) was originally intended to be an amendment to subsection (g), 79 U.S.C.C.A.N. 688, 79th Cong., 2d Sess. Subsection (g), unlike (e), has a long residence requirement as a condition precedent for the citizen parent to be able to transmit citizenship to a child, whose other parent was an alien, and who was born outside the United States and possessions. It also required that the child reside in the United States for a specified period in order to retain his citizenship.

These same distinctions were made in section 301 of the Immigration and Nationality Act.

CONCLUSION

We conclude that the district director's decision was correct. Accordingly, the appeal is hereby dismissed.

ORDER: The appeal is dismissed.

DATED: Dec. 31, 1992

FOR THE ASSOCIATE
COMMISSIONER, EXAMINATIONS

/S/ Terrance M. O'Reilly
Terrance M. O'Reilly,
Director Administrative
Appeals Unit

APPENDIX K

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 27, 1995.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUZVISAMINDA ABLANG, Plaintiff-Appellee, v. JANET RENO,* Attorney General, et al., Defendant-Appellant.	No. 93-56129 D.C. No. CV-92-05476-IH ORDER (Filed Jun. 27, 1995)

Before: TROTT, FERNANDEZ, and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* Janet Reno is substituted for her predecessor William P. Barr, Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(1).

(2)

Supreme Court, U.S.
FILED
NOV 24 1995
OFFICE OF THE CLERK

No. 95-506

In the Supreme Court of the United States

OCTOBER TERM, 1995

LUZVISAMINDA ABLANG, PETITIONER

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
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15 pp

QUESTION PRESENTED

Whether Section 205 of the Nationality Act of 1940, which provides rules for the transmission of United States citizenship to certain children born abroad to unmarried parents, violates the equal protection component of the Fifth Amendment's Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-505

LUZVISAMINDA ABLANG, PETITIONER

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 52 F.3d 801. The orders of the district court (Pet. App. 56-59) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1995. A petition for rehearing was denied on June 27, 1995. Pet. App. 79. The petition for a writ of

certiorari was filed on September 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in the Philippines on June 8, 1946. Pet. App. 4. The Philippines were at that time an "outlying possession" of the United States. *Id.* at 5 n.1. Petitioner's mother was a Philippine national, and her father was a United States serviceman stationed in the Philippines. *Id.* at 4. Petitioner's parents were not married, and her father returned to the United States before her birth. *Id.* at 5. Petitioner was raised by a Philippine family, and she did not become aware of the circumstances of her birth until her natural mother reestablished contact with her some time after her graduation from high school. In 1981, when she was in her mid-30's, petitioner wrote to her father at an old address given to her by her mother. He responded, and he and petitioner met for the first time in 1987. *Ibid.*

In 1990 petitioner applied for a certificate of citizenship from the Immigration and Naturalization Service (INS), and in 1991 she applied for a U.S. passport from the Department of State. Pet. App. 5. Petitioner submitted declarations from her father acknowledging paternity, along with the results of genetic testing establishing a 95.77% probability of paternity. The INS and the State Department denied petitioner's applications, on the ground that paternity had not been established while she was still a minor, as required by Section 205 of the Nationality Act of 1940, ch. 876, 54 Stat. 1139-1140 (1940 Act). *Ibid.*

2. Petitioner then filed this action seeking a declaratory judgment that she is a United States

citizen. Pet. App. 6. After a hearing, the district court granted petitioner's motion for summary judgment. *Id.* at 56-58. The court's order incorporated by reference (*id.* at 57) a transcript of the hearing (*id.* at 30-55), at which the court had stated its reasons for granting petitioner's motion. First, the court interpreted Section 201 of the 1940 Act, 54 Stat. 1138-1139, as granting United States citizenship at birth to any child born to a citizen parent, so that petitioner had acquired U.S. citizenship at birth. Pet. App. 31, 35. The court then reasoned that Section 205 of the Act "t[ook] * * * away" the citizenship so acquired, if the citizen parent was the father (rather than the mother) and if paternity was not established during the child's minority. Pet. App. 31-32, 35. The court concluded that Section 205 violated equal protection principles both as a "sexist discrimination" and because "the legitimation requirement imposed on the child is not rationally related to any governmental purpose." *Id.* at 32.

3. The court of appeals reversed. Pet. App. 1-14. The court rejected (*id.* at 8) the district court's conclusion that Section 205 of the 1940 Act operates by "revoking a previous grant of citizenship" made by Section 201. Instead, the court held that "citizenship does not inhere under the Act unless and until paternity is established, provided this takes place by the age of majority." Pet. App. 8. The court thus framed the issue as whether Section 205's rules for the transmission of citizenship distinguish impermissibly between classes of children born abroad to one citizen parent and one alien parent, either on the basis of the child's legitimacy, or on the basis of the citizen parent's gender. Pet. App. 8.

The court of appeals held that, under this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), the distinctions drawn by Congress in Section 205 of the 1940 Act must be sustained if they could be supported by any "facially legitimate and bona fide reason." Pet. App. 9. The court equated that standard with the "rational basis" standard generally employed in equal protection analysis. *Ibid.* The court concluded both that it was reasonable for Congress, in a statute dealing with transmission of citizenship by birth, to require proof of descent from a citizen parent, and that a distinction between citizen mothers and citizen fathers could be justified in this context on the ground that "in most cases there is a reasonable expectation that [an] illegitimate child's maternal descent will be easier to trace than her paternal descent." *Id.* at 12. With respect to the requirement that paternity be established during the child's minority, the court accepted (*id.* at 12-13) the government's arguments that "proof may be harder to obtain as the years go by," and that Congress could rationally have determined that a child born abroad to an unmarried alien mother would be more likely to have early and close ties to the United States if the child's relationship to a U.S. citizen father was established while the child was still a minor.

ARGUMENT

1. In *Fiallo* v. *Bell*, 430 U.S. 787, 794-795 (1977), this Court reaffirmed that judicial review of immigration and nationality legislation is limited to determining whether a challenged provision is supported by "a facially legitimate and bona fide reason." Petitioner argues (Pet. 8-12), however, that the court of appeals erred in declining to apply "intermediate

scrutiny" in resolving her equal protection claim, either because her case "involves the rights of a U.S. citizen parent to transmit citizenship" or because "petitioner was indisputably a United States national at the time of [her] birth." Pet. 9.

As the court of appeals concluded (Pet. App. 10 n.4), petitioner has no standing to assert rights personal to her father. See, *e.g.*, *Powers* v. *Ohio*, 499 U.S. 400, 410-411 (1991); *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976) (opinion of Blackmun, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499-500, 509-510 (1975). Moreover, this Court has previously rejected similar efforts to expand "the limited scope of judicial inquiry into immigration legislation" on the ground that a particular provision also affects the interests of citizen litigants. *Fiallo*, 430 U.S. at 792, 794-795 & n.6; see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 767-769 (1972); *Wauchope* v. *Department of State*, 985 F.2d 1407, 1414 (9th Cir. 1993); *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990).

It is true that petitioner was born in the Philippines at a time when citizens of the Philippines were non-citizen "nationals" of the United States. Nationality Act of 1940 (1940 Act), ch. 876, § 101(b)(2), 54 Stat. 1137 (*reprinted at* Pet. App. 22); *Resurreccion-Talavera* v. *Barber*, 231 F.2d 524, 525 (9th Cir. 1956). As petitioner points out elsewhere (Pet. 25), however, at the time of her birth in June, 1946, federal law also specifically provided that Philippine citizens were to be treated as aliens for purposes of this country's immigration laws. Philippine Independence Act, ch. 84, § 8(a)(1), 48 Stat. 462 (1934) (*reprinted at* Pet. App. 15); see, *e.g.*, *Madrona Banez* v. *Boyd*, 236 F.2d 934, 936 (9th Cir. 1956). The proclamation of Philippine independence was issued less than one month after

petitioner's birth. At that time, Section 14 of the Philippine Independence Act, 48 Stat. 464, became operative. That Section provided that upon the final and complete withdrawal of United States sovereignty over the Philippine Islands, "the immigration laws of the United States (including all the provisions there-of relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." See *Rabang* v. *Boyd*, 353 U.S. 427, 429-430 (1957). Petitioner did not apply for a certificate of U.S. citizenship until 1990, some 34 years later.

In any event, the fact that petitioner was briefly covered by a federal law that classified all persons born in U.S. possessions and owing ultimate allegiance to the United States as U.S. "nationals" provides no basis for heightened constitutional scrutiny of Congress's separate choices with respect to the quite different question of which such persons, not having been born within the United States itself, would be accorded U.S. citizenship by virtue of their descent. As to that question, this Court has repeatedly made clear that "over no conceivable subject is the legislative power of Congress more complete." *Fiallo*, 430 U.S. at 792 (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)); see also *id.* at 796; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702-703 (1898).

2. The court of appeals therefore correctly held that *Fiallo*'s "facially legitimate and bona fide reason" standard applies in this case. Petitioner argues (Pet. 12-19) that, even under that standard, Section 205 of the 1940 Act must be struck down

because it lacks a rational basis.[1] As the court of appeals held (Pet. App. 12-13), however, Section 205 is justified on the same grounds that this Court recognized as permissible in *Fiallo*.

Fiallo involved a provision that granted preferential immigration status to the "children" or "parents" of United States citizens. *Fiallo*, 430 U.S. at 788. In the case of children born outside marriage, the law recognized the mother's relationship to the child under all circumstances, but it recognized the father's relationship only if the child was legally legitimated before the child turned 18 and while the child was in the legal custody of the legitimating parent. *Id.* at 788-789 & n.1. The petitioners alleged that the provision discriminated unlawfully on the basis of sex, marital status, and illegitimacy, denied them due process by establishing "an unwarranted conclusive presumption," and burdened various fundamental rights. *Id.* at 791.

In rejecting those arguments, this Court identified two "facially legitimate and bona fide reason[s]" (*Fiallo*, 430 U.S. at 794) for Congress's decision not to extend preferential status to non-legitimated children and their natural fathers: "a perceived absence in most cases of close family ties," and "a concern with the serious problems of proof that usually lurk in

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[1] The court below has equated the "facially legitimate and bona fide reason" standard with the "rational basis" test used in equal protection analysis of domestic laws. Pet. App. 9, citing *Wauchope* v. *Department of State*, 985 F.2d at 1414 n.3. In our view, the *Fiallo* standard is less rigorous than the rational basis test. Cf. *Fiallo*, 430 U.S. at 799 n.8 (contrasting immigration and domestic contexts). The point is not critical in this case because the court of appeals held that Section 205 satisfies the rational basis test.

paternity determinations." *Id.* at 799. The Court noted that Congress might have given "substantial weight" to the "inherent difficulty of determining the paternity of an illegitimate child," which was "compounded when it depends upon events that may have occurred in foreign countries many years earlier." *Id.* at 799 n.8.

Recognizing that "there are widely varying relationships and degrees of kinship," the Court held in *Fiallo* that "[i]n the inevitable process of 'line drawing,'" it was "appropriate for Congress to consider not only the nature of [kinship] relationships but also problems of identification, administration, and the potential for fraud." 430 U.S. at 795 n.6. The Court's opinion acknowledged that the law precluded relief even in cases in which a particular father and child could prove the existence and strength of their family relationship (*id.* at 798), and it noted the contentions that the provision was "based on an overbroad and outdated stereotype" and that problems of proof were not, in fact, intractable (*id.* at 799 n.9). Under the "facially legitimate and bona fide reason" standard, however, the Court held that it was "not the judicial role * * * to probe and test the justifications for the legislative decision," which "remain[ed] one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'" *Id.* at 799 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

As the court of appeals recognized (Pet. App. 12-13), the same legislative concerns that this Court held to be "facially legitimate" in *Fiallo* support the very similar provision at issue in this case. Problems of proof and questions about the existence of close family ties that could justify denying certain limited

immigration preferences may surely also justify similar restrictions on the far more significant congressional decision to confer American citizenship on a child born abroad.[2] Petitioner's arguments to the contrary (Pet. 12-19) rely on the dissent in *Fiallo* (see Pet. 15, 18) and on principles appropriate to equal protection analysis in the domestic context. See *Fiallo*, 430 U.S. at 799 n.8 ("our cases clearly indicate that legislative distinctions in the immigration area need not be as '"carefully tuned to alternative considerations,"' *Trimble* v. *Gordon*, [430 U.S. 762,] 772 [(1977)] (quoting *Matthews* v. *Lucas*, 427 U.S. 495, 513 (1976)), as those in the domestic area.").[3] Petitioner identifies no conflict in authority on the issue involved here, however, and she offers no persuasive reason for this Court to revisit its conclusion in *Fiallo* that challenges to the assumptions and choices underlying Congress's immigration-related line-

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[2] The history of the 1940 Act in fact indicates concern with the problem of transmission of citizenship to foreign-born children with little connection to this country. See 86 Cong. Rec. 11,948 (1940) (remarks of Rep. Rees) ("substantive changes [in the nationality laws] are necessary in connection with certain rights, with a view to preventing persons who have no real attachment to the United States from enjoying the high privilege of American nationality.").

[3] Petitioner also contends (Pet. 19-22) that Section 205 is unconstitutional because it creates an "irrebuttable presumption" (Pet. 21) based on her illegitimacy and her father's sex. This Court rejected the same argument in *Fiallo*. 430 U.S. at 791, 798-799; cf., *e.g.*, *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977) (upholding use of categorical criteria in determining eligibility for government benefits); *Weinberger* v. *Salfi*, 422 U.S. 749, 785 (1975) (same).

drawing "should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.[4]

3. Finally, petitioner argues (Pet. 22-26) that she should be recognized as a citizen based on Section 201(i) of the 1940 Act (added by Act of July 31, 1946, ch. 708, 60 Stat. 721; *reprinted at* Pet. App. 26-27), which applies to persons "born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who * * * served * * * honorably in the armed forces of the United States" during World War II. At the time of petitioner's birth, however, the Philippines were an "outlying possession[]" of the United States. Pet. App. 5 n.1, 38; see *id.* at 22 (1940 Act § 101(e), 54 Stat. 1137).[5] Thus, even if we assume that petitioner could be excused for not complying with the residency requirements set out in Section 201(i) as a condition for retaining citizenship (see Pet. App. 27), she never

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[4] As the court of appeals noted (Pet. App. 10 n.3), since *Fiallo* was decided, Congress has amended the provision at issue in that case "in terms that equalize the relationship between natural mothers and fathers and their children." See 8 U.S.C. 1101(b)(1)(D). By contrast, current law pertaining to transmission of citizenship contains a legitimation provision very similar to the 1940 Act provision at issue in this case. See 8 U.S.C. 1409. Congress revised that provision in some detail as recently as 1986, tightening some of its requirements and retaining the distinction between citizen fathers and citizen mothers. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3657, as amended by the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(k), 102 Stat. 2617-2618.

[5] Petitioner did not appeal the district court's ruling (Pet. App. 38) that Section 201(i) did not apply for this reason, and she did not raise that provision in the court of appeals as an alternative ground for affirmance.

qualified for recognition as a citizen under that Section. Neither the court of appeals' characterization of petitioner's mother as an alien (rather than as a non-citizen national, see *Resurreccion-Talavera* v. *Barber*, 231 F.2d at 525), see Pet. 23, nor the Philippine Independence Act's provisions treating Philippine citizens as aliens for most immigration purposes, changes that result.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Because the court of appeals rejected petitioner's constitutional challenge to Section 205, it did not reach the government's supplementary contention that a district court's remedial powers do not extend to conferring citizenship in derogation of a limitation imposed by Congress, even if that limitation is held to be unconstitutional. See *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988) ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [Congress's] limitations.").